THE

SUPREME COURT ACT

R. S., c. 139 (1906) as amended by 3-4 Geo. V, c. 51; 4-5 Geo. V, c. 15; 7-8 Geo. V, c. 23; 8-9 Geo. V, c. 7.

PRACTICE

AND

RULES

WITH REFERENCE TO ALL THE DECISIONS OF THE COURT DEALING WITH ITS PRACTICE AND JURISPRUDENCE.

VOL. II

BY

EDWARD ROBERT CAMERON

ONE OF HIS MAJESTY'S COUNSEL AND REGISTRAR OF THE COURT

TORONTO:
CARSWELL & CO., LTD.
LONDON:
SWEET & MAXWELL, LIMITED
1919

PREFACE

There have been published twelve volumes of the Supreme Court Reports since Vol. I. of Cameron's Supreme Court Practice (2nd edition) was issued in 1912. The jurisdiction of the Court in the meantime has been considerably affected by a number of important amendments made by Parliament to the Supreme Court Act; notably by 3-4 Geo. V., chap. 51, which defines the expression "final judgment" where it appears in the Statute, and by 8-9 Geo. V., chap. 7, whereby the limitations heretofore applicable only to the Province of Ontario, are extended to all the provinces of Canada except Quebec.

By General Order of the Court, passed October, 1918, various substantial changes have been made in certain of the rules of the Court, particularly, with respect to printing of appeal cases and the tariff of fees taxable to solicitors.

All the reported practice decisions of the Court since 1912 are contained in the present volume and in addition there will be found many other practice cases both of the Court and of the Registrar, not heretofore published. It has been thought desirable to publish the reasons for judgment in a number of these cases as an appendix to this volume.

The entire Supreme Court Act and Rules with the amendments and decisions thereunder since 1912 are reproduced in the text.

R. E. CAMERON.

Ottawa, July 5th, 1919.

TABLE OF CASES

Page
29

173
46
139
29
136
69
56
10

60

REVISED STATUTES OF CANADA

(AS AMENDED, 1906.)

[Marginal references are to the pages of Cameron's Supreme Court Practice, 2nd edition.]

CHAPTER 139.

AN ACT RESPECTING THE SUPREME COURT OF CANADA.

SHORT TITLE.

1. This Act may be cited as the Supreme Court Act R. S., c. 135, s. 1. p. 1.

INTERPRETATION.

2. In this Act, unless the context otherwise requires,—

(a) 'the Supreme Court' or 'the Court' means the Supreme Court of Canada;

(b) 'judge' means a judge of the Supreme Court of Canada and includes the Chief Justice;

(c) 'Registrar' means the Registrar of the Supreme Court;

(d) 'judgment,' when used with reference to the court appealed from, includes any judgment, rule, order, decision, decree, decretal order or sentence thereof; and when used with reference to the Supreme Court, includes any judgment or order of that court;

(e) 'final judgment' means any judgment, rule, order or decision, whereby the action, suit, cause, matter or other judicial proceeding, is finally determined and concluded.

On the 6th of June, 1913, by 3-4 Geo. V. c. 51, 2 (*e*) was repealed, and the following substituted:—

"(e) Save as regards appeals from the Province of Quebec, 'final judgment' means any judgment, rule, order or decision which determines in whole or in part any substantive

S. 2, s.s. (d).

Judgment.

right of any of the parties in controversy in any action, suit, cause, matter or other judicial proceeding; and, as regards appeals from the Province of Quebec, 'final judgment' means, as heretofore, any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded."

On the 27th of May, 1914, a further amendment was made by 4-5 Geo. V. c. 15, as follows:—

"The provisions of paragraph (e) of section 2 of the Supreme Court Act, chapter 139 of the Revised Statutes, 1906, as enacted by section 1 of chapter 51 of the statutes of 1913, shall apply as well to actions, suits, causes, matters or other judicial proceedings commenced before the date of the passing of the said chapter 51 as to actions, suits, causes, matters or other judicial proceedings commenced since that date: Provided however that this Act shall not apply to any action, suit, cause, matter or other judicial proceeding to which the court has held that the said paragraph does not apply.

2. The costs of any appeal instituted before the passing of this Act in any such action, suit, cause, matter or other judicial proceeding to which the said paragraph (e) of said section 2 of the Supreme Court Act would not, save for the enactment of this Act have been applicable, shall be in the discretion of the court."

The effect of these amendments are discussed, *infra* p. 4.

(f) 'appeal' includes any proceeding to set aside or vary any judgment of the court appealed from;

(g) 'the court appealed from' means the court from which the appeal is brought directly to the Supreme Court, whether such court is one of original jurisdiction or a court of appeal;

(h) 'witness' means any person, whether a party or not, to be examined under the provisions of this Act. R. S. c. 135, ss. 2 and 96.

p. 1.

Power of court to vary its own judgment.

Montreal Assurance Co. v. McGillivray, 13 Moo. P. C. 125.

In this case the order of the Privy Council had been remitted to the Court of Queen's Bench, Lower Canada, upon motion by the successful party. The Committee amended its previous order and instead of reversing the judgment of the Queen's Bench directed that Court to remit the record to the Superior Court with direction to issue a "*venire de novo*," their

Lordships saying, "their Lordships desire it to be distinctly understood that they make this correction as a matter of form as they deem it, and not at all as affecting their decision upon the merits of the case." S. 2, s.s. (d). Judgment.

The King v. Wallberg, 44 S. C. R. 208.

Minutes of judgment were settled and entered by the Registrar on the 17th of June, 1911, and certified to the Exchequer Court on June 19th. A motion was made on October 4th, 1911, to the Supreme Court to vary the judgment as entered. The Court granted the motion and pronounced the following judgment: "In this case the Court considers that the minutes as assented by the Registrar do not carry out the intention of the Court as disclosed by the reasons for judgment, and that the formal judgment of the Court should order that the judgment of the Exchequer Court be varied by reducing the amount of the plaintiff's recovery to that awarded to him by the report of the referee."

Prevost v. Bedard, 51 Can. S. C. R. p. 629.

Where by an accidental slip or oversight the formal judgment on an appeal failed to express the clear intention of the Court that certain amendments in the pleadings should be allowed for the purpose of effective relief to the successful party, the Supreme Court of Canada, on application subsequent to the transmission of the formal judgment to the Court below, ordered that its judgment should be varied by inserting therein a direction that the judgment appealed from and the plaintiff's declaration should be varied so as to correct the inadequate description of certain lands therein mentioned. *Rattray* v. *Young* (Cout. Dig. 1123), and *Penrose* v. *Knight* (Cout. Dig. 1122), referred to. Idington and Duff, JJ., dissented from this order.

Per Duff, J.—The judgment that the Court in fact pronounced, and intended to pronounce, was simply that the appeal should be dismissed; such judgment does not involve any consequences whatever in respect of the amendment of the judgment or pleadings in the Court of original jurisdiction. The power of the Court to amend a judgment after it has become a record of the Court is specially limited to making the record conform to the judgment pronounced or intended to be pronounced; it does not authorize the recalling of the judgment in order to deal with a collateral matter not actually or constructively involved in the Court's decision. The proper course was

S. 2, s.s. (e). Final Judgment.

to apply to the Court of original jurisdiction for an amendment of the record of that Court.

The application was allowed only upon payment of costs thereof by the party moving inasmuch as it had been his duty to have been that the provision was inserted at the time of the settlement of the minutes of judgment.

p. 9.

Final judgment.

In 1879 when the definition of this expression was first put in the Supreme Court Act, the distinctions between common law and equity actions were clearly defined. It was some years afterwards that the two systems were fused for the first time by the adoption of the Judicature Act in the Province of Ontario, a system which has been subsequently introduced in all the provinces of Canada except Quebec. Under the old practice it was only in equity cases that a judge at the trial gave a judgment in which, after determining certain issues of law or fact, he directed a reference to an officer of the Court and reserved the case for further consideration, including the question of costs and the entry of judgment, until after the referee had made his report. The Supreme Court Act at that time, therefore, expressly provided that in all this class of cases, the Supreme Court could review the judgment at the trial after it had been taken in appeal to the Court of Appeal, and could also review the judgment of the Court of Appeal where an appeal had been taken from the Referee's report, and the provision still subsists in section 38 which gives an appeal to the Supreme Court "from the judgment, whether final or not . . . in any action, suit, cause, etc., originally instituted in any superior Court of equity in any province of Canada, except the Province of Quebec."

In recent years it has become a not uncommon practice of Judges at the trial in common law actions to refer questions of damages and liability to a referee, and reserve final consideration of the case until after the report of such referee. Previous to the amendment of 1913 the Supreme Court held that no appeal lay in a common law case where the judgment of the Court of Appeal reviewed the judgment at the trial and where further directions had been reserved: *Crown Life* v. *Skinner*, 44 Can. S. C. R. 617. The Supreme Court also held that it had no jurisdiction to hear an appeal from the Court of Appeal where the latter Court had reviewed the report made by the referee in a common law action: *Clarke* v. *Goodall*, 44 Can. S. C. R. 284. Later on the Supreme Court held that where in a common law case after a reference the cause came back to be heard

on further directions and an appeal was taken from such a judgment on further directions to the Court of Appeal, the Supreme Court, although having jurisdiction to hear an appeal, could not review the previous decisions of the Court of Appeal where the cause had gone to such court upon an appeal either from the trial Judge or the referee. (*Hesseltine* v. *Nelles*, 47 Can. S. C. R. 230). S. 2, s.s. (e). Final Judgment.

In the final result, therefore, it happened that in all common law cases where further directions were reserved, whatever might be the amount involved, or however important might be the issues, if the trial Judge, in his judgment, reserved the case for further consideration, the judgments below were not susceptible of review by the Supreme Court of Canada. It is obvious that this result was never contemplated when the Supreme Court Act was framed, but has arisen through the changes in the practice and procedure which have developed during the last thirty years in the various provinces of Canada by the adoption of the Judicature Act.

The present amendment has been framed for the purpose of giving an appeal in the classes of cases above mentioned, but does not apply to appeals from Quebec.

Final judgments from the Province of Quebec.

Leroux v. Julliet, Dec. 10, 1913.

Article 1059 and following provide that where parties agree respecting the boundary between their respective lands, the Court names a surveyor to make a plan of the locality, place boundary marks in presence of witnesses in accordance with law, then draw up a statement of his operations and return the same to the Court. The plaintiff and the defendant being unable to agree upon their boundary line nor upon a survey, the plaintiff (defendant) brought an action in the Superior Court in which he asked the Court to appoint a surveyor to proceed with a bornage. No defence was filed, and an interlocutory order was made on the 12th April, 1910, directing bornage to take place, and on the 16th of May, upon application, one John H. Sullivan was appointed to be surveyor, and directed to make his report in a month. The surveyor made his report, in which he said that owing to the difficulty of taking evidence of the witnesses he preferred to have the parties make their proof in Court and subject to the questions of possession and prescription, proceeded to determine the true line between the lands, on the 17th of Feb., 1911. On motion to the Court, Mr. Justice Bruneau pronounced judgment in which he says, amongst other things: "Considering

S. 2, s.s. (e). Final Judgment.

the defendant has not pleaded to the action of the plaintiff, but had simply appeared by his counsel to watch the procedure in its present course, and considering that the defendant has not opposed the motion for homologation of the surveyor's report and to the inscription for final judgment following the said report ..... and considering that the line X and Y (appearing on his plan), appears to give to the parties to the cause the land to which they are entitled by virtue of the cadastre, ordered the surveyor to proceed to the bornage of the said lands following the line X and Y, and condemned the defendant to pay the costs of the action. From this judgment an appeal was taken to the Court of King's Bench, when the judgment below was reversed. The Court saying that considering the surveyor had proceeded to a bornage of the property without hearing any witnesses, upon the question of possession, or having the parties make proof before the Court, and considering that the Court of first instance had homologated the report without hearing witnesses upon the question of possession, and considering that the defendant in an action of bornage has the right to have his witnesses heard, even if he has not pleaded to the action, annulled the judgment below, and ordered the dossier to be transmitted to the Supreme Court to have a new surveyor proceed regularly to the bornage of the said lands. From this judgment the plaintiff appealed to the Supreme Court of Canada when the Court raised the question of its jurisdiction, and after hearing counsel, quashed the appeal for want of jurisdiction, but without costs, as the point was not taken by the respondent.

Town of Montmagny v. Water Supply Co.; Rousseau, Mis en Cause. May 4th, 1915.

This was an action brought by the Town of Montmagny to have certain of its own by-laws declared illegal, null and *ultra vires*, whereby a certain franchise for supplying water to the municipality was given to the *mis en cause*, and by him assigned to the defendants. The defendants demurred to the declaration on the ground that the facts alleged did not support the conclusion of his demand. The demurrer was argued before the Honourable Mr. Justice Cimon in the Superior Court, who struck out various paragraphs of the declaration, and as to the paragraphs which asked relief on the ground that the defendants had not fulfilled their obligations as set out in the contract he ordered proof. From this judgment the plaintiff applied to Mr. Justice Carroll of the Court of King's Bench for leave to

S. 2, s.s. (e). Final Judgment.

appeal to that Court, which was granted on the ground that the judgment was interlocutory within the terms of Art. 16 C. C. P. The respondent moved the Court of King's Bench to quash the appeal on the ground that no appeal lay. This motion was refused, the Court saying, "the motion of respondent asking to have the appeal dismissed because the judgment rendered in the cause was not susceptible of appeal, and after having deliberated, dismissed the motion with costs. Article 4614 R. S. Q. 1888, provides as follows: "No appeal lies under the provisions of this chapter from any judgment respecting municipal matters rendered by any Judge of the Superior Court." Subsequently the appeal on the merits came on to be heard before the Court of King's Bench, when the Court reversed its previous judgment and held that all the allegations struck from the declaration by the interlocutory judgment were municipal matters, and that by virtue of Arts. 4178-4615 R. S. Q. there was no appeal from the judgments rendered by the Superior Court concerning municipal matters, and that the judgment below was not susceptible of appeal. An appeal was taken from this judgment to the Supreme Court of Canada, the appellants contending that the last judgment of the Court of King's Bench was a reversal of its previous judgment in the same matter. The Supreme Court of its own motion raised the question of its jurisdiction, but subsequently heard the appeal on the merits, the majority of the Court being of the opinion that there was jurisdiction. Mr. Justice Anglin was of a contrary opinion, saying "on the question of the finality of the judgment of the Court of King's Bench, this case is distinguishable from *St. Jean* v. *Molleur*, 40 S. C. R. 139, in that here the Court of King's Bench, without passing on the merits of the demurrer allowed by the Superior Court, dismissed the plaintiff's appeal from it for want of jurisdiction whereas in *St. Jean* v. *Molleur*, the Court of King's Bench sustained on the merits the judgment of the Superior Court allowing a demurrer. So long as it has not been affirmed on the merits by the Court of King's Bench according to the jurisprudence of the Province of Quebec, an order of the Superior Court allowing a demurrer for part only of the plaintiff's claim would seem not to be a final judgment. I incline strongly to the opinion that no appeal lies to this Court."

S. 2, s.s. (e). Final Judgment.

Decisions Before the Amendment of 1913, 3-4 Geo. V. Chapter 51.

Hesseltine v. Nelles, 47 Can. S. C. R. 230.

On the trial before the Chancellor of Ontario of an action claiming damages for breach of contract judgment was given for the plaintiffs with reference to the Master to ascertain the amount of damages, further directions being reserved. This judgment was affirmed by the Court of Appeal. The Master then made his report which, on appeal to the Chief Justice of the Common Pleas, was varied by reduction of the amount awarded. The Chancellor then pronounced a formal judgment on further directions in favour of the plaintiff for the damages as reduced. The defendants appealed from the judgments of the Chief Justice and the Chancellor, and the two appeals were, by order, heard together, but not formally consolidated. Both judgments were affirmed by the Court of Appeal, and the defendants sought to appeal from the judgment affirming them, and also from the original judgment sustaining the decision at the trial, having applied without success to the Court below for an extension of time to appeal from the latter judgment. See *Nelles* v. *Hesseltine*, 27 Ont. L. R. 97.

Held, Brodeur, J., dissenting, that the only judgment from which an appeal would lie was that affirming the judgment of the Chancellor on further directions; that the Chancellor could not review the original judgment of the Court of Appeal nor that varying the Master's report, and the Court of Appeal was equally unable to review them on the appeal from the Chancellor's decision, and the Supreme Court being required by statute to give the judgment that the Court of Appeal should have given was likewise debarred from reviewing these earlier decisions.

Dunn v. Eaton, 47 Can. S. C. R. 205.

In an action claiming rescission of a contract for the sale of timber lands and other equitable relief and, in the alternative, damages for deceit, the trial Judge held that it was a case for damages only and gave judgment accordingly, and referred to a referee matters arising out of a counterclaim ordering him also to take an account of moneys paid, an inquiry as to liens and incumbrances and as to the quantity of standing timber on the lands and other proper accounts. Further consideration of the cause was reserved. This judgment was affirmed by the full Court, and the defendants sought to appeal to the Supreme Court of Canada.

Held, that the action tried and determined was the common law action for deceit only; that the judgment given therein was not a final judgment within the meaning of that term in the "Supreme Court Act"; and that the Court had no jurisdiction to entertain the appeal. *Clarke* v. *Goodall*, 44 Can. S. C. R. 284, and *Crown Life Ins. Co.* v. *Skinner*, 44 Can. S. C. R. 616, followed. S. 2, s.s. (e). Final Judgment.

Denman v. The Clover Bar Coal Company, 48 Can. S. C. R. 318.

After some subscriptions for stock had been received and the company was about to offer other stock for public subscription, a meeting of the directors was held at which the plaintiff, then one of the directors and the company's manager, resigned his office as a director and was appointed sales agent for the company's output of coal for five years from that date, at a liberal scale of remuneration, with the exclusive right to make such sales in Alberta, Saskatchewan and Manitoba. At the same time an arrangement was made by which the other directors derived advantages in regard to certain matters in dispute, respecting the affairs of the company, between them and the plaintiff. The material facts and circumstances connected with these arrangements were not disclosed to the shareholders who then held stock in the company, nor to other persons who subsequently subscribed for shares of its stock.

Held, affirming the judgment appealed from (7 D. L. R. 96; 2 West. W. R. 986; 22 W. L. R. 128), that, as the plaintiff and his co-directors were in a fiduciary position and complete disclosure of the circumstances in regard to the making of the contract had not been made to all the shareholders, present and future, the agreement was not binding upon the company.

The order in the judgment appealed from directing that, on taking the accounts between the parties, an allowance should be made to the plainaiff, on the basis of *quantum meruit*, for services rendered by him while in the employ of the company was not disturbed.

Per Fitzpatrick, C.J., and Idington, Anglin and Brodeur, JJ.—Where the judgment sought to be reviewed has finally disposed of one of the issues, forming a distinct and separate ground of action, the Supreme Court of Canada has jurisdiction to hear and determine the appeal: *La Ville de St. Jean* v. *Molleur*, 40 Can. S. C. R. 129, and *McDonald* v. *Belcher*, [1904] A. C. 429, followed; *Hesseltine* v. *Nelles*, 47 Can. S. C. R. 230, referred to.

S. 2, s.s. (e). Final Judgment.

Stephenson v. The Gold Medal Furniture Manufacturing Company, 48 Can. S. C. R. 497.

Before the amendment, in 1913, to section 2 (e) of the Supreme Court Act, R. S. C. 1906, chapter 139, judgments were rendered maintaining an action on a bond by which two of the defendants were ordered to pay to the plaintiffs an amount not exceeding that secured by the bond to be ascertained upon a reference to the master and further directions were reserved; as to another defendant, recovery of the same amount, to be ascertained in the same manner, was ordered, but there was no reserve of further directions. Upon an appeal by the last mentioned defendant,

Held, Davies, J., dissenting, that the judgment sought to be appealed from (23 Man. R. 159), did not finally conclude the action as proceedings still remained to be taken on the reference, consequently, it was not a final judgment within the meaning of section 2 (e) of the Supreme Court Act, prior to the amendment by the statute 3 & 4 Geo. V. c. 51 (assented to on the 6th of June, 1913), and it was not competent to the Supreme Court of Canada to entertain the appeal. *The Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Co.*, 19 Can. S. C. R. 434, followed. *Ex parte Moore*, 14 Q. B. D. 627, distinguished; *Clarke* v. *Goodall*, 44 Can. S. C. R. 284, and *The Crown Life Ins. Co.* v. *Skinner*, 44 Can. S. C. R. 616, referred to.

Per Anglin and Brodeur, JJ.—The amendment of the Supreme Court Act by the first section of 3 & 4 Geo. V. c. 51, has not affected whatever right the appellant may have had at the time the judgment was rendered in respect to an appeal to the Supreme Court of Canada. *Hyde* v. *Lindsay*, 20 Can. S. C. R. 99; *Cowen* v. *Evans*, 22 Can. S. C. R. 331; *Hurtubise* v. *Desmarteau*, 19 Can. S. C. R. 562, and *Taylor* v. *The Queen*, 1 Can. S. C. R. 65, referred to.

Per Davies, J., dissenting.—The judgment in question does not reserve "further directions" and comes within the rule and principle determining what are "final judgments" laid down in the case of *Ex parte Moore*, 14 Q. B. D. 627.

Decisions after 1913, 4-5 Geo. V. c. 51.

Wood v. The Grand Valley Railway Company, 51 Can. S. C. R. 283.

An agreement in writing provided that in consideration of the purchase of bonds of the Grand Valley Railway Co. by

s. 2, s.s. (e).
Final Judgment.

certain manufacturing companies and other citizens of St. George, Ont., P., president of the company, undertook and agreed on his own behalf and on behalf of his company to procure a through traffic arrangement with the Canadian Pacific Co. so as to give St. George the benefit of competitive freight rates; that he would do all things lawful to secure such arrangement; and that the extension of the Grand Valley road to St. George and the securing of said arrangement would be proceeded with at once and with the greatest possible despatch. The agreement was signed "The Grand Valley Ry. Co., A. J. Pattison, Pres't." Some work was done on the extension of the line to St. George, but it was never completed. The purchasers paid for $10,000 worth of bonds on which dividends were paid for five years when payments ceased. The purchasers brought action against the company and P. claiming the return of the money paid or damages for breach of contract. The trial Judge held (26 Ont. L. R. 441), that each of the purchasers was entitled to substantial damages, and gave them judgment for $10,000, and directed return of the bonds on payment. The Divisional Court (27 Ont. L. R. 556), held that the individual purchasers were only entitled to nominal damages, and gave judgment for the corporate purchasers for the amount they paid for the bonds. The Appellate Division (30 Ont. L. R. 44), held that all were entitled to substantial damages, but ordered a reference as the evidence was not sufficient to determine the amount. All held P. personally liable as well as the company. The purchasers appealed to the Supreme Court of Canada, asking that the judgment at the trial be restored. The defendants by cross-appeal claimed dismissal of the action.

Held, Idington, J., dissenting, that the judgment of the Appellate Division be affirmed.

Per Davies, J., while not formally dissenting from the conclusion to affirm, that the damages might be assessed at $10,000 as at the trial.

Per Idington, J.—That the individual purchasers are only entitled to nominal damages; that the maximum to be allowed the corporate purchasers is the amount they subscribed for the bonds; and that the order of reference should be modified accordingly.

Held, per Anglin, J.—The substantive right in controversy on the appeal is the quantum of damages; that was not determined adversely to the appellants by the judgment appealed against; they were, therefore, not deprived of a "substantive right in controversy in the action" within the meaning of that

S. 2, s.s. (c). Final Judgment.

phrase in clause (c) of 4 & 5 Geo. V. c. 51, s. 1, and the appeal should be quashed for want of jurisdiction which would dispose of the cross-appeal as well.

The Saint John Lumber Company v. Roy, 53 Can. S. C. R. 310.

No appeal lies to the Supreme Court of Canada from a judgment of the Supreme Court of New Brunswick affirming the decision of a Judge who refused to set aside his order for service of a writ out of the jurisdiction. Idington, J., dissenting.

Per Davies and Anglin, JJ.—The judgment did not dispose of any substantive right . . . in controversy in the action, and therefore was not a final judgment, as that term is defined in 3 & 4 Geo. V. c. 51.

The appeal was quashed, but respondent was only given the general costs of appeal to the date of the motion to quash as he had not conformed to the requirements of Supreme Court Rules 4 and 5.

Jones v. Tucker, 53 Can. S. C. R. 431.

T., resident in the State of Iowa, U. S. A., brought suit in Saskatchewan for specific performance of a contract by which J., resident in Saskatchewan, agreed to sell him lands in Saskatchewan, part of the price being the conveyance to J. of lands in Iowa by T. The trial Judge decreed specific performance of the contract by J., and, on appeal, the full Court varied the judgment by ordering that there should be a reference for inquiry and report upon T.'s title to the lands in Iowa, and that, upon the filing of such report, either party should be at liberty to apply for such judgment as he might be entitled to (8 Sask. L. R. 387). On the appeal to the Supreme Court of Canada the material questions were whether or not the fact that the lands to be exchanged were situated outside the province precluded the courts of Saskatchewan from decreeing specific performance for want of mutuality of relief, and whether or not there was error in making the order of reference, which, in effect, gave the plaintiff a second opportunity of proving his title.

Held, Idington, J., dissenting, that the courts of Saskatchewan, as Courts of Equity acting *in personam*, have jurisdiction to decree specific performance of contracts for the sale of lands situate within the province where the person against whom relief is sought resides within their jurisdiction; that, in the suit instituted by the foreign plaintiff in Saskatchewan, mutuality of relief existed between the parties, and that the discretion of the Court appealed from in ordering the reference before the

entry of the formal decree ought not to be interfered with on the appeal.

S. 2, s.s. (e) Final Judgment.

The jurisdiction of the Supreme Court of Canada to entertain the appeal was questioned by the Chief Justice and Idington, J., on the ground that the judgment appealed from was not a "final judgment." Davies, J., was of opinion that, as the suit was "in the nature of a suit or proceeding in equity," an appeal lay to the Supreme Court of Canada in virtue of subsection (c) of section 38 of the Supreme Court Act, R. S. C. 1906, c. 39. Anglin, J., thought that, as a matter of discretion, the Court might decline to hear such an appeal.

Judgment appealed from (8 Sask. L. R. 387) affirmed, Idington, J., dissenting.

The Komnick System Sandstone Brick Machinery Company v. The B. C. Pressed Brick Company, 56 Can. S. C. R. 539.

An action brought by the appellant was dismissed by the trial Court upon the merits, and by the Court of Appeal for British Columbia on the ground that the appellant, being an unlicensed extra-provincial company, had been prohibited by the Companies Act of 1897, from making the contract sued upon. Later on this legislation was held by the Judicial Committee of the Privy Council to be *ultra vires* of the provincial legislature. The Companies Act was subsequently amended by enacting the following provision:—

"Where an action, suit, or other proceeding has been dismissed or otherwise decided against an extra-provincial company on the ground that any act or transaction of such company was invalid or prohibited, by reason of such company not having been licensed or registered pursuant to this or some former Act, the company may, if it is licensed or registered as required by this Act, and upon such terms as to costs as the Court may order, maintain anew such action, suit, or other proceeding as if no judgment had therein been rendered or entered."

Held, that the appellant was not obliged to bring an action *de novo*, but had the right to ask for a reinstatement or revivor of the dismissed action at the stage at which it was when the judgment based upon the statute subsequently held *ultra vires* was pronounced.

The judgment appealed from holding that the action must be begun *de novo* is a final judgment within the meaning of paragraph (e) of section 2 of the Supreme Court Act.

S. 2, s.s. (e). **Joseph Lecomte v. J. M. De C. O'Grady, 57 Can. S. C. R. 563.**

Final Judgment.

In an action in the Court of King's Bench, Man., on a document providing for payment of money a case was stated for the opinion of the Court as to whether or not said document was a promissory note. On appeal from the judgment of the Court of Appeal thereon:—

Held, that the judgment disposed of substantive rights of the parties, and was a final judgment as the same is defined in section 2 (*e*) of the Supreme Court Act.

The document was in the following form:—

"On the 15th Sept., 1911, without grace, after date I promise to pay to the order of O'G., A. & Co. at the Bank of Nova Scotia, Winnipeg, the sum of three thousand dollars, value received."

"Stock certificate for 30 shares
Gas Traction Co. Ltd., attached
to be surrendered on payment."

The memo. as to shares was written on the document before it was signed.

Held, Brodeur, J., dissenting, that the memo. was not an integral part of the document, that it was not a condition but a consequence of payment, and the document was, therefore, a valid promissory note.

Judgment of the Court of Appeal ([1918] 2 W. W. R. 267; 40 D. L. R. 378) reversing ([1918] W. W. R. 115), affirmed.

See *Cromarty* v. *Cromarty*, *infra*, p. 57, and **Appendix** C. 19.

Windsor Security Co. v. Applebe, March 6, 1918.

The Ontario Mortgagor & Purchasers' Relief Act provides that under certain circumstances an action of foreclosure of a mortgage could only be brought with leave of a Judge. An order granting such leave was reversed by the Appellate Division. The mortgage company launched an appeal from this judgment to the Supreme Court of Canada. Upon a motion to affirm jurisdiction the Registrar held the judgment in appeal was not final, and refused the application. A motion by way of appeal from the judgment of the Registrar was not proceeded with. (See Appendix C. 1).

See *Wood* v. *Gauld*, *infra*, p. 56.

Migneron v. Walker, Nov. 20th, 1913.

In this case an attachment was taken before judgment on property worth less than $2,000 although the claim of plaintiff was sworn to as worth more than $2,000. The attachment

SUPREME COURT OF ONTARIO

RULES PASSED 19TH JUNE, 1914, AND ORDERED TO COME INTO FORCE ON THE 2ND DAY OF JULY, 1914.

Rules 491 and 492 are repealed and the following substituted therefor:—

492.—(1) An appeal from a judgment pronounced at a trial or a motion for a new trial shall be by a notice of motion returnable before a Divisional Court seven days after service, and shall be set down to be heard within fifteen days from the date of the judgment.

(2) All other appeals shall be by a notice of motion returnable before a Divisional Court two clear days after service, and shall be set down to be heard within seven days from the date of the judgment or order.

(3) Cases shall be entered on the list for hearing as soon as the papers are completed.

(4) If the evidence is not deposited within seven days after notice from the office of the Registrar of the High Court Division that it has been received from the stenographer, the appeal shall be deemed to be abandoned and costs may be taxed as provided by rule 660.

(5) The notice of motion may be according to the following form:—

(STYLE OF CAUSE.)

Take notice that the appeals to a Divisional court from the judgment (or order) pronounced by on the day of 191 , on the following grounds (stating them briefly).

Dated the day of , 191 .

Solicitor for

To , Esq.,
Solicitor for

676.—(5) Costs payable out of the proceeds of land sold under The Devolution of Estates Act shall be allowed and taxed according to Tariff "E" to these rules.

TARIFF "E."

COSTS ALLOWED ON SALES OF LAND UNDER THE DEVOLUTION OF ESTATES ACT.

(a) To the Solicitor for the Personal Representative.

1. Where sale price is under $200, $10.
Where it is over $200, up to and including $400, $12.
Where it is over $400, up to and including $600, $15.
Where it is over $600, up to and including $800, $20.
Where it is over $800, up to and including $1,000, $25.
Where it is over $1,000, up to and including $1,500, 2½%.
Where it is over $1,500, up to and including $2,000, $37 plus 2%.
Where it is over $2,000, up to and including $3,000, $17 plus 1½%.
Where it is over $3,000, up to and including $5,000, $32 plus 1%.
Where it is over $5,000, $57 plus ½ of 1%.

Where a part of the land of an estate has been sold, in the case of any subsequent sale three-fourths of the foregoing amount shall be allowed.

2. In addition to the above amounts there shall be allowed:—

(*a*) The cost of taking out Letters of Administration or Letters Probate and of Succession Duty Affidavits as fixed by the Surrogate Courts Rules, where there is no personal estate out of which such costs can be paid.

(*b*) The proper disbursements for advertising for creditors where there is no personal estate out of which such disbursements can be paid.

(*c*) Where the sale is by auction, the auctioneer's fee and the costs of all necessary printing of advertisements.

(*d*) The fees paid to valuators.

(*b*) *Costs of Official Guardian.*

3. The costs of the Official Guardian shall be one-third of the amount allowed under item 1, and his actual disbursements.

(*c*) *Special Allowances.*

When special circumstances render the amount taxable under this tariff unreasonable or inadequate, a Judge may order the allowance of a smaller or larger sum.

was quashed and judgment affirmed by the Court of Appeal. The Supreme Court raised the question of its jurisdiction, and at the close of appellant's argument, quashed the appeal for want of jurisdiction, saying, if this judgment is interlocutory there is no appeal, if it is final the amount involved is the value of the property seized, which is less than $2,000.

S. 2, s.s. (e). Final Judgment.

Stokes Stevens Oil Co. v. McNaught, Oct. 23rd, 1917, 57 Can. S. C. R. 549.

An agreement in writing provided, amongst other things, that disputes between the parties should be determined by arbitration. A dispute having arisen, the arbitration took place, but the appointment of one arbitrator was made without prejudice to the right of the party appointing him to dispute the validity of any award which should be made. After an award had been made one of the parties brought an action against the other upon the agreement, thereupon the other party applied to the Court to restrain any proceeding in such action, on the ground that the award had determined the rights and obligations of the parties.

The judgment of first instance held that the relief asked for in the action did not come within the agreement to arbitrate and refused a stay of proceedings, but on appeal his judgment was reversed. The parties thereupon appealed to the Supreme Court and moved before the Registrar to affirm jurisdiction, which was granted, and his judgment was affirmed by the Court on appeal.

See Appendix C. 2.

THE COURT.

3. The Court of common law and equity in and for Canada now existing under the name of the Supreme Court of Canada is hereby continued under that name, as a general Court of appeal for Canada, and as an additional Court for the better administration of the laws of Canada, and shall continue to be a Court of record. 6 E. VII. c. 50, s. 1.

THE JUDGES.

4. The Supreme Court shall consist of a chief justice to be called the Chief Justice of Canada, and five puisne judges, who shall be appointed by the Governor-in-Council by letters patent under the Great Seal. 59 V. c. 14, s. 1.

Judge.

5. Any person may be appointed a Judge who is or has been a Judge of a Superior Court of any of the provinces of Canada, or a barrister or advocate of at least ten years' standing at the bar of any of the said provinces. R. S. c. 135, s. 4.

6. Two at least of the Judges shall be appointed from among the Judges of the Court of King's Bench, or of the Superior Court, or the barristers or advocates of the province of Quebec. R. S. c. 135, s. 4.

7. No Judge shall hold any other office of emolument either under the Government of Canada or under the Goverr ient of any province of Canada. R. S. c. 135, s. 4.

8. The Judges shall reside at the City of Ottawa, or within five miles thereof. R. S. c. 135, s. 4.

9. The Judges shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons. R. S. c. 135, s. 5.

10. Every Judge shall, previously to entering upon the duties of his office as such Judge, take an oath in the form following:—

'I, , do solemnly and sincerely promise and swear that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as Chief Justice (or as one of the Judges) of the Supreme Court of Canada. So help me God.' R. S. c. 135, s. 9; 50-51 V., c. 16, s. 57.

11. Such oath shall be administered to the Chief Justice before the Governor-General, or person administering the Government of Canada, in Council, and to the puisne Judges by the Chief Justice, or, in his absence or illness, by any other Judge present at Ottawa. R. S. c. 135, s. 10.

THE REGISTRAR AND OTHER OFFICERS.

12. The Governor-in-Council may, by an instrument under the Great Seal, appoint a fit and proper person, being a barrister of at least five years' standing, to be Registrar of the Supreme Court. R. S. c. 135, s. 11.

13. The Registrar shall hold office during pleasure, and shall reside and keep office at the City of Ottawa. R. S. c. 135, s. 11.

S. 14. Registrar.

14. "The Registrar shall have the rank of a deputy head of a department, and shall be paid a salary of five thousand dollars per annum."

On 6th June, 1913, by 3-4 G. V. c. 51, section 14 of the Revised Statutes of Canada, chapter 139, was repealed, and this section made to read as it appears in the text.

15. The Registrar shall, subject to the direction of the Minister of Justice, oversee and direct the officers, clerks and employees appointed to the Court. 3 E. VII. c. 69, s. 3.

16. The Registrar shall give his full time to the public service, and shall not receive any pay, fee or allowance in any form in excess of the amount hereinbefore provided. 3 E. VII. c. 69, s. 3.

17. The Registrar shall, under the supervision of the Minister of Justice, have the management and control of the Library of the Court and the purchase of all books therefor. 51 V. c 37, s. 4.

18. The Registrar shall, until otherwise provided, publish the reports of the decisions of the Court. 50-51 V. c. 16, s. 57.

19. The Registrar shall have such authority to exercise the jurisdiction of a Judge sitting in chambers as may be conferred upon him by general rules or orders made under this Act. 50-51 V. c. 16, s. 57.

20. The Governor-in-Council may appoint a reporter and assistant reporter, who shall report the decisions of the Court, and who shall be paid such salaries respectively as the Governor-in-Council determines. 50-51 V. c. 16, s. 57.

21. The Governor-in-Council may, from time to time, appoint such other clerks and servants of the Court as are necessary, all of whom shall hold office during pleasure. R. S. c. 135, s. 11; 50-51 V. c. 16, s. 57.

22. The provisions of the Civil Service Act and of the Civil Service Superannuation and Retirement Act shall, so far as applicable, extend and apply to such officers, clerks and servants at the seat of Government. R. S. c. 135, s. 14.

23. The Sheriff of the County of Carleton, in the province of Ontario, shall be ex officio an officer of the Court and shall perform the duties and functions of a sheriff in connection therewith. R. S. c. 135, s. 15.

S. 24.

Barrister and Solicitor.

BARRISTERS AND SOLICITORS.

24. All persons who are barristers or advocates in any of the provinces of Canada may practice as barristers, advocates and counsel in the Supreme Court. R. S. c. 135, s. 16; 50-51 V. c. 16, s. 57.

25. All persons who are attorneys or solicitors of the Superior Courts in any of the provinces of Canada may practise as attorneys, solicitors and proctors in the Supreme Court. R. S. c. 135, s. 17; 50-51 V. c. 16, s. 57.

26. All persons who may practise as barristers, advocates, counsel, attorneys, solicitors or proctors in the Supreme Court shall be officers of the Court. R. S. c. 135, s. 18; 50-51 V. c. 16, s. 57.

SESSIONS AND QUORUM.

27. Any five of the Judges of the Supreme Court shall constitute a quorum and may lawfully hold the Court. 51 V. c. 37, s. 1.

28. It shall not be necessary for all the Judges who have heard the argument in any case to be present in order to constitute the Court for delivery of judgment in such case, but in the absence of any Judge, from illness or any other cause judgment may be delivered by a majority of the Judges who were present at the hearing. 51 V. c. 37, s. 1.

Opinion of Absent Judge.

29. Any Judge who has heard the case and is absent at the delivery of judgment, may hand his opinion in writing to any Judge present at the delivery of judgment, to be read or announced in open Court, and then to be left with the Registrar or reporter of the Court. 51 V. c. 37, s. 1.

p. 70.

On the 2nd day of May, 1918, a number of judgments were pronounced by the Court in which a member of the Court sat, but was absent from illness and was unable to hand down any judgments, but the judgments of the Court would not have been affected either way, whatever his judgments might have been.

30. No Judge against whose judgment an appeal is brought, or who took part in the trial of the cause or matter, or in the hearing in a Court below, shall sit or take part in the hearing of or adjudication upon the proceedings in the Supreme Court.

2. In any cause or matter in which a Judge is unable to sit or take part in consequence of the provisions of this section, any four of the other Judges of the Supreme Court shall constitute a quorum and may lawfully hold the Court. 52 V. c. 37, s. 1.

S. 30, ss. 2. Judge absent

31. Any four Judges shall constitute a quorum and may lawfully hold the Court in cases where the parties consent to be heard before a Court so composed. 50 V. c. 14, s. 2.

On June 16th, 1913, by 3-4 G. V. c. 51, the following amendment was made:—

Nautical Assessors.

"31a. The Court may, in any admiralty appeal, in which it may think it expedient so to do, call in the aid of one or more assessors specially qualified and try and hear such appeal wholly or partially with the assistance of such assessors. The remuneration, if any, to be paid to such assessors shall be determined by the Court."

p. 71.

During recent years, the Supreme Court has in its judgments pointed out that it is at a disadvantage in admiralty appeals in not having the power to obtain the assistance of nautical assessors, a power which the Courts below have, and frequently exercise, as also does the Judicial Committee of the Privy Council on appeal from the Supreme Court. The present amendment is copied from the provision to be found in the English Judicature Act of 1873, empowering the Court of Appeal to appoint nautical assessors. 36-37 V. c. 66, s. 56 (Imp.).

Ad Hoc Judges.

On April 12th, 1918, by 8-9 G. V. c. 7, the following amendment was made, which has met a long felt want, when through illness or other cause the Court was without a quorum. Occasionally it has happened that counsel have attended sessions of the Court from a distance, and have been compelled to return without having had their cases heard owing to lack of a quorum.

"31a. (1)—If at any time there should not be a quorum of the Judges of the Supreme Court available to hold or continue any session of the Court, owing to a vacancy or vacancies, or to the absence through illness or on leave or in the discharge of other duties assigned by statute or Order-in-Council, or to the disqualification of a Judge or Judges, the Chief Justice, or, in his absence, the senior puisne Judge, may in writing request the attendance at the sittings of the Court, as an ad hoc Judge, for

p. 71.

S. 31 (a).

Ad hoc Judge.

such period as may be necessary, of the Judge of the Exchequer Court, or, should he be absent from Ottawa or for any reason unable to sit, of a Judge of a provincial Superior Court to be designated in writing by the Chief Justice or in his absence by any Acting Chief Justice or the senior puisne Judge of such provincial Court upon such request being made to him in writing.

Provided always that unless two of the Judges of the Supreme Court available fulfil the requirements of section six, the ad hoc Judge for the hearing of an appeal from a judgment rendered in the Province of Quebec shall be a Judge of the Court of King's Bench or a Judge of the Superior Court of that province designated as above provided.

(2) A duplicate of the requisition of the Chief Justice or senior puisne Judge and where a Judge of a provincial Court is designated to act, the letter designating him shall be filed with the Registrar and shall be conclusive evidence of the authority of the Judge named therein to act under this section.

(3) It shall be the duty of the Judge whose attendance has been so requested or who has been so designated in priority to other duties of his office, to attend the sittings of the Supreme Court at the time and for the period for which his attendance shall be required, and while so attending he shall possess the powers and privileges and shall discharge the duties of a puisne Judge of the Supreme Court.

(4) An ad hoc Judge who attends a sittings of the Supreme Court or any conference of the Judges called for the consideration of judgments in cases in which he sat, shall be paid his travelling expenses and shall receive a per diem allowance for living expenses of ten dollars for each day that he is necessarily absent from his place of residence, as provided by section 18 of the Judges Act.

(5) In any case in which judgment is not delivered while such Judge is attending the sittings of the Court or a conference of the Judges, his opinion shall be delivered as is provided by section 29 of this Act."

"32. The Supreme Court for the purpose of hearing and determining appeals shall hold, in each year, at the City of Ottawa, three sessions.

"2. The first session shall begin on the first Tuesday in February, the second on the first Tuesday in May, and the third on the second Tuesday in October, in each year.

S. 32. Session.

"3. The dates in the preceding sub-section, fixed for the beginning of each session, may be varied by the Governor-in-Council, or by the Court, provided that notice shall be given in The Canada Gazette not less than four weeks before the date which may be fixed for the beginning of any session.

"4. Each of the said sessions shall be continued until the business before the Court is disposed of." 3-4 G. V. c. 51.

33. The Supreme Court may adjourn any session from time to time and meet again at the time appointed for the transaction of business.

2. Notice of such adjournment and of the day fixed for the continuance of such session shall be given by the Registrar in The Canada Gazette. R. S. c. 135, s. 21.

34. The Court may be convened at any time by the Chief Justice, or, in the event of his absence or illness, by the senior puisne Judge, in such manner as is prescribed by the rules of Court. R. S. c. 135, s. 22.

APPELLATE JURISDICTION.

35. The Supreme Court shall have, hold and exercise an appellate, civil and criminal jurisdiction within and throughout Canada. R. S. c. 135, s. 23.

Court below curia designata.

Gosnell v. Minister of Mines, Feb. 7th, 1913.

Certain legislation existed in the Province of British Columbia regarding the right of a British subject to a grant of the lands of the Crown. The Land Act, 7 E. VII. c. 30, provided as follows:—

Section 5: Except as hereinafter appears any person being the head of a family, a widow or single man over the age of 18 years, and being a British subject, may for agricultural purposes record any tract of unoccupied and unreserved Crown lands (not being an Indian settlement), not exceeding one hundred and sixty acres in extent."

Section 7: On receipt of the said application the Commissioner shall forthwith determine whether the description in the application and declaration is sufficient to satisfy him that the land is vacant and open to pre-emption, and if satisfied, and there is no valid objection why the record should not be made, shall issue the record as hereinafter provided.

Section 107: Any person affected by any decision of a Stipendiary Magistrate, Justice of the Peace, or Commissioner under

S. 35.

Appellate Jurisdiction. Court *curia designata.*

this Act may, within one calender month after such decision, but not afterwards, appeal to the Supreme Court in a summary manner; and such appeal shall be in the form of a petition, verified by affidavit, to any Judge of such Court, setting out the points relied upon; and a copy of such petition shall be served upon the Magistrate, Justice or Commissioner whose decision is appealed from, and such time shall be allowed for his answer to the said petition as to the Judge of the Supreme Court may seem advisable; but no such appeal shall be allowed except from decisions on points of law.

Section 109: Any person dissatisfied with the decision of a Judge of the Supreme Court, in respect of any matter arising under this Act, may appeal to the Full Court at Victoria, provided that notice of appeal be given to the opposite party within thirty days, etc."

By the interpretation section of the said Act, Commissioner means the Chief Commissioner of Lands and Works of the province and the person acting as such for the time being. The appellant Gosnell applied to record a tract of land which he had staked in accordance with the requirements of the Act. In reply to his application he received a reply from the Minister of Lands stating that the lands were within the boundaries of the Indian Reserve, and in consequence the Department was not in a position to deal with the application. Thereupon the appellant presented a petition to the Supreme Court of B. C. appealing from the decision of the Minister of Lands. The petition was heard by the Chief Justice. The respondents rested their case largely on certain proceedings purporting to have been taken in carrying out one of the articles of the Union of 1871, by which the charge of Indians was transferred to the Dominion Government.

The Chief Justice found in favor of the Minister and dismissed the petition. Thereupon the petitioner appealed to the Court of Appeal for B. C., when it was held that the petitioner had no status to present the petition in the first place. From this judgment an appeal was taken to the Supreme Court of Canada. When the appeal was called the Court raised the question of jurisdiction, and asked counsel to discuss the question and deal with the following points: 1o. Did the cause of action arise in a Superior Court, and 2o. Were the Courts below *curia designata?* After argument the Court, without reserving judgment, quashed the appeal for want of jurisdiction, but without costs.

Darius Wigle v. The Corporation of the Township of Gosfield South, May 28, 1913.

S. 35.

Appellate Jurisdiction. Court *quia designata.*

The action began by writ of summons in the High Court of Justice, in which the plaintiff claimed damages against the defendants for obstructing the waters of a creek whereby his lands were flooded. The cause came before the Chancellor of Ontario for hearing, when an order was made as follows: "This Court doth order and adjudge that the matters in dispute between the parties be transferred for trial by the referee appointed under the provisions of the Municipal Drainage Act, to be tried pursuant to the provisions of the said Act, and all proceedings herein may be had and taken as if the action had originally been brought under and by virtue of the said Act."

Pursuant to this order the reference was carried on before G. F. Henderson, K.C., Drainage Referee, who gave judgment for the plaintiff for $5,000. The defendant appealed to the Court of Appeal, and the plaintiff cross-appealed. The judgment at the trial was reduced to $1,300, and the cross-appeal dismissed with costs.

Held by Davies, Idington and Anglin, JJ., that the consent order of reference was an acceptance by the parties of the machinery of the Municipal Drainage Act for the determination of the matters in dispute on the then pending action, including the limitations as to procedure and rights of appeal which the legislation in creating the machinery saw fit to impose upon its use, and that while the power to take away a right of appeal to the Supreme Court which Parliament has conferred could not be conceded to a Provincial Legislature, it was competent to the litigants themselves to waive or forego any right of appeal, and this they had done.

See Appendix C. 3.

Practice and procedure in Court below.

Richards v. Baker, Oct. 10, 1913.

In this case the plaintiff (respondent) brought an action against defendant, who was the sheriff of Victoria, British Columbia, alleging that the defendant illegally refused to withdraw from the seizure of certain goods and chattels until he was paid a sum of $219.34 poundage. The plaintiff tendered the sum of $51.45, the sheriff's other fees. At the trial it was held that the defendant sheriff having been tendered the lawful costs of the execution creditor, the sheriff was wrongfully in possession under the writ. The sheriff appealed on the ground that he was entitled to poundage, that no legal tender had been made, and

S. 35.

Appellate Jurisdiction. Practice and procedure.

that the execution creditor should have been a party to the action, but at the argument in the Court of Appeal, counsel for the sheriff abandoned part of his claim for poundage. In the Supreme Court, after counsel had opened the case the Chief Justice announced that the Court had read the papers and was of opinion the case was one solely of procedure of the Court below, involving but a trifling sum of money; the Court would not entertain it, and appeal was dismissed with costs.

Township of Cornwall v. Ottawa & New York Rly. Co., 52 S. C. R. 466.

When the parties to the action by consent agreed to skip an intermediate Court of Appeal and *per saltum* carry the appeal to a higher Court, which also had jurisdiction, had the appeal been proceeded with regularly, the appeal is competent and the Appellate Court is not sitting *extra cursum curiae*.

Serling v. Levine, 47 Can. S. C. R. p. 103.

An action for damages *ex delicto* was instituted against a minor without impleading a tutor to assist him, and the exception of minority was set up. Proceedings taken by the plaintiff to have a tutor appointed had not been concluded when the defendant became of age, and an order, which was disregarded by the defendant, was then obtained requiring him to plead to the action. On a summons for his examination *sur faits et articles*, defendant appeared and certain objections to questions were made by counsel on his behalf. On an inscription for judgment *ex parte*, subsequently filed, judgment was entered against him.

Held, per Idington, Duff and Brodeur, JJ., that irregularities of procedure in a Court of first instance are matters to be dealt with by the Judges of that Court and, unless some prejudice has resulted therefrom, the discretion exercised by such Judges in respect thereto ought not to be disturbed by an appellate Court.

Per Idington, Duff and Brodeur, JJ., Fitzpatrick, C.J., and Anglin, J., contra. In the circumstances the defendant suffered no prejudice within the meaning of article 174 of the Code of Civil Procedure. The exception resulting from minority is relative merely and may be waived by a defendant, sued during his minority, without the necessary assistance required by law, appearing after attaining majority and taking objections to subsequent proceedings in the action. He cannot, thereafter, complain of being treated as a defendant properly cited before

the Court nor of a judgment *ex parte* entered against him therein. S. 36. Appellate Jurisdiction.

Per Idington, Duff and Brodeur, JJ.—Irregularity in inscription for judgment *ex parte* is not a reason for the dismissal of an action.

Per Fitzpatrick, C.J. and Anglin, J., dissenting.—The fact that the defendant was a minor at the time of the institution and service of the action and that no tutor or curator was made a party to the suit for the purpose of assisting him therein constitutes an absolute bar to the action which could not be validated in consequence of further proceedings therein after the defendant attained the age of majority. The action was a nullity *ab initio* and, consequently, the defendant suffered prejudice within the meaning of article 174 C. P. Q. *Larue* v. *Poulin*, 9 Que. P. R. 157; *Fairbanks* v. *Howley*, 10 Que. P. R. 72, and *Robert* v. *Dufresne*, 7 Que. P. R. 226, referred to.

36. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest Court of final resort now or hereafter established in any province of Canada, whether such Court is a Court of Appeal or of original jurisdiction, in cases in which the Court of original jurisdiction is a Superior Court: Provided that:— p. 94.

(a) there shall be no appeal from a judgment in any case of proceedings for or upon a writ of habeas corpus, certiorari or prohibition arising out of a criminal charge or in any case of proceedings for or upon a writ of habeas corpus, arising out of any claim for extradition made under any treaty; and,

(b) there shall be no appeal in a criminal case except as provided in the Criminal Code. R. S. c. 135, ss. 24 and 31; 54-55 V. c. 25, s. 2; 55-56 V. c. 29, ss. 742 and 750.

Highest Court of Final Resort.

In the Province of Ontario, "the Appellate Division of the Supreme Court of Ontario" (R. S. O. 1914, c. 56).

Trustees Grosvenor St. Presbyterian Church v. Toronto, May, 1918.

This was an action begun by an originating summons to recover a sum of money payable under an award. It was held by the Registrar that the appeal did not lie under section 39 of the Supreme Court Act as this was not "a judgment on a motion to set aside an award, or by way of appeal from an award," but an appeal did lie under section 36, as it was a

S. 36.

Appellate Jurisdiction.

final judgment of the highest Court of final resort in a case which originated in a Superior Court.

See Appendix C. 4.

Bradshaw v. Newman (motion), January 25, 1917.

A motion was made before the Registrar to affirm jurisdiction under the following circumstances.

The plaintiff (respondent) brought an action in the Province of British Columbia to recover money due on the sale of land in that province. An objection was taken to the status of the plaintiffs, who were of German birth, but had been naturalized in Canada. The defendant appealed, contending that the plaintiffs must be treated as alien enemies, and the action should be dismissed or enlarged until after the war. The Court of Appeal in British Columbia held that so long as they remained British subjects they were entitled to the privileges of British subjects in the province, and what they were seeking now was a right which arose in and was claimed in the province. The Registrar held the Supreme Court had jurisdiction, as it was an appeal under section 36 of the Act from a final judgment of the highest Court of last resort in the province. An appeal to the Supreme Court from this judgment was dismissed.

See Appendix C. 5.

When the Court below holds it has no jurisdiction.

Some doubt has arisen with respect to the jurisdiction of the Supreme Court to hear an appeal when the Appellate Court below has held that it has no jurisdiction.

The question first arose in *St. Cunegonde* v. *Cougeon*, 25 S. C. R. 78, when Strong, C.J., held that as no appeal in that case lay to the Court of Queen's Bench (Quebec), from the Court of Review, and that Court properly refused to entertain jurisdiction, it followed that no appeal would lie to the Supreme Court. What the Chief Justice meant was that the Supreme Court could not in such a case review the decision of the Courts below on the merits, for in the case of *Lord* v. *The Queen*, 31 S. C. R. 165, where the Court of Queen's Bench had *ex mero motu* raised the point of jurisdiction, holding that it was not competent to entertain an appeal after the expiration of the delays prescribed by law, and dismissed an appeal for want of jurisdiction, Sir Henry Strong speaking for the Court, held that the Court of Queen's Bench was wrong in so holding, allowed the appeal and remitted the case to the Court of Queen's Bench to be heard on the merits.

In *Beck Manufacturing Co.* v. *Valin*, 40 S. C. R. 523, Idington, J., says the right to assert an appeal against a Court asserting jurisdiction when it has none is a very common case, and I have not the slightest doubt of the right to appeal on the converse ground of failure to assert jurisdiction. In *Hull Electric Co.* v. *Clement*, 41 S. C. R. 419, the Court followed *Ste. Cunegonde* v. *Gougeon*, *supra*. The head note of the case would have been more accurately expressed if it had contained the word "property" before "quashing" in the second line. If the Supreme Court had been of the opinion that the Court of King's Bench had erred in holding it was without jurisdiction there is no doubt it would have had the power to say so. S. 36. Appellate Jurisdiction.

37. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest Court of final resort now or hereafter established in any province of Canada, whether such Court is a Court of Appeal or of original jurisdiction, where the action, suit, cause, matter or other judicial proceeding has not originated in a Superior Court, in the following cases:— p. 103.

(a) In the province of Quebec if the matter in controversy involves the question of or relates to any fee of office, duty, rent, revenue, sum of money payable to His Majesty, or to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound; or amounts to or exceeds the sum or value of two thousand dollars;

(b) In the provinces of Nova Scotia, New Brunswick, British Columbia and Prince Edward Island, if the sum or value of the matter in dispute amounts to two hundred and fifty dollars or upwards, and in which the Court of first instance possesses concurrent jurisdiction with a Superior Court;

(c) In the provinces of Saskatchewan and Alberta by leave of the Supreme Court of Canada or a Judge thereof;

(d) From any judgment on appeal in a case or proceeding instituted in any Court of Probate in any province of Canada other than the Province of Quebec, unless the matter in controversy does not exceed five hundred dollars;

(e) In the Yukon Territory in the case of any judgment upon appeal from the Gold Commissioner. 50-51 V., c. 16, s. 57; 51 V. c. 37, ss. 2 and 3; 52 V. c. 37, s. 2; 54-55 V. c. 25, s. 3; 56 V. c. 29, s. 2; 2 E. VII. c: 35, s. 4.

S. 37.

Appellate Jurisdiction.

Hillman v. The Imperial Elevator and Lumber Company, 53 Can. S. C. R. 15.

An action commenced in the District Court was, by consent of the parties, transferred to and subsequently carried on in the Supreme Court of Saskatchewan as if a new writ had been issued therein; the statement of claim, pleadings and proceedings being all filed and taken in the latter Court.

Held, that, although the proceedings, after the issue of the writ, had all been carried on in the Court of superior jurisdiction, yet as the cause originated in a Court of inferior jurisdiction, an appeal *de plano* would not lie to the Supreme Court of Canada: *Tucker* v. *Young*, 30 Can. S. C. R. 185, followed.

An order in the Supreme Court of Saskatchewan was made extending the time for appealing beyond the sixty days limited for bringing the appeal by the Supreme Court Act, under section 71. On an application, under section 37 (*e*) of the Supreme Court Act, for special leave to appeal,—

Held, also, following *Goodison Thresher Co.* v. *Township of McNab*, 42 Can. S. C. R. 694, that, notwithstanding the order extending the time for appealing made in the Court appealed from, the Supreme Court of Canada had no jurisdiction to grant special leave for an appeal after the expiration of the sixty days limited for bringing appeals by section 69 of the Supreme Court Act.

37. (a)—Quebec Cases.

Canada and Gulf Terminal Co. v. Fleet, 25th June, 1918, 57 Can. S. C. R. 140.

An appeal lies to the Supreme Court of Canada under section 37 of the Supreme Court Act, from the judgment of the Court of King's Bench in the Province of Quebec in an appeal from a ruling of the Quebec Public Utilities' Commission which had affirmed its own jurisdiction to accord rights to the Intercolonial Railway over the Canada and Gulf Terminal Railway (Fitzpatrick, C.J., and Idington, J., dissenting).

Per Fitzpatrick, C.J., and Idington, J., dissenting.—The Public Utilities' Commission, constituted by R. S. Q. 1909, article 718, is not a "Court" in the sense of that word in the Supreme Court Act.

Appeal dismissed with costs.

37. (b)—Appeals from British Columbia:

The jurisprudence of the Supreme Court is not yet settled with respect to the interpretation to be given to the words in

the sub-section "in which the Court of first instance possesses concurrent jurisdiction with a Superior Court." S. 37. Appellate Jurisdiction.

Traders Bank v. Nelson & Fort Sheppard Rly. Co., 8 W. W. R. 99.

In this case the action was brought in the County Court of West Kootenay. The claim was for over $250, but the judgment was for only $125. This action was consolidated with another action in the Superior Court, and an appeal in both cases was brought from the Court of Appeal below to the Supreme Court. It was held by a majority of the Court that this appeal should be quashed, and notwithstanding the fact that more than $250 was claimed, an appeal did not lie under section 37 (*b*) of the Supreme Court Act.

Vancouver Breweries v. Dana, 52 Can. S. C. R. 134.

The plaintiffs, as assignees of a lease made by the defendants, brought an action to recover two months' rent amounting to $431.50, in the County Court of Vancouver. Upon the application of the defendant the action was transferred to the Supreme Court of British Columbia, and thereafter the action was continued and judgment given in the Supreme Court. The plaintiff succeeded at the trial, and this judgment was affirmed by the Court of Appeal. An appeal was taken to the Supreme Court of Canada, no question of jurisdiction was raised, and after argument the appeal was dismissed with costs. Nov. 2nd, 1915.

The Windsor Hotel v. Peake, 18th Oct., 1916.

The plaintiff brought an action against the defendant, the Windsor Hotel Co., in the County Court of East Kootenay, British Columbia, for an order restraining the defendants from trespassing upon certain lands, and requiring them to remove certain buildings. The trial Judge found there had been trespass, and gave judgment for $300 damages; this judgment was affirmed by the Court of Appeal. The defendants appealed to the Supreme Court of Canada, no question of jurisdiction was raised.

Champion v. The World Building Company, 50 Can. S. C. R. 188.

For an appeal to lie to the Supreme Court in a case not originating in a Superior Court, as provided in section 37, sub-section (*b*) of the Supreme Court Act, it is not sufficient

S. 37. Appellate Jurisdiction.

that the inferior Court has concurrent jurisdiction with a Superior Court in respect to its general jurisdiction; there must be concurrent jurisdiction as respects the particular action, suit, cause, matter or other judicial proceeding in which the appeal is sought.

In British Columbia the County Court alone may maintain an action to enforce a mechanic's lien. In such action, so far as the parties or any of them stand in the relation of debtor and creditor the Court may give judgment for the debt due whatever its amount, and if it exceeds $250 there may be an appeal to the Court of Appeal.

Held, Duff, J., dissenting, that though an action for the debt could be brought in the Supreme Court the foundation for the County Court action is the enforcement of the lien as to which there is no concurrent jurisdiction, and no appeal lies to the Supreme Court of Canada from the judgment of the Court of Appeal in such an action.

Tait v. The British Columbia Electric Railway Co., 54 Can. S. C. R. 76.

An action in a County Court in British Columbia to recover $578, damages for injuries sustained, alleged to have been caused through negligence, was dismissed by the County Court Judge after the evidence for the plaintiff had been put in; the defendants offered no evidence, but asked for dismissal on the evidence as it stood. The plaintiff appealed to have judgment entered in his favor or, alternatively to have the case remitted to the County Court to have damages assessed, or for such further order as might be deemed proper by the Court of Appeal. The appeal was dismissed and the judgment appealed from affirmed. The British Columbia Court of Appeal Act, R. S. B. C. 1911, c. 51, s. 15, s.-s. 3, provides that every appeal shall include a motion for a new trial unless otherwise stated in the notice of appeal. On motion to quash an appeal to the Supreme Court of Canada on the grounds that the notice prescribed by section 70 of the Supreme Court Act, R. S. C. 1906, c. 139, had not been given within 20 days from the date of the judgment appealed from, and that the action was not of the class in which a County Court had concurrent jurisdiction with a Superior Court, under section 37*b* of the Supreme Court Act limiting appeals to the Supreme Court of Canada.

Held, Duff, J., dissenting, that no appeal could lie to the Supreme Court of Canada.

Per Fitzpatrick, C.J. and Idington, J. (Duff and Anglin, JJ., contra).—As the case was not one in which a County Court is given concurrent jurisdiction with a Superior Court, under section 40 of the County Courts Act, R. S. B. C. 1911, c. 53, the Supreme Court of Canada had no jurisdiction to entertain the appeal. *Champion* v. *The World Building Co.*, 50 Can. S. C. R. 382, referred to. S. 37. Appellate Jurisdiction.

Per Davies, J., the appeal should be quashed with costs.

Per Anglin, J.—In the circumstances of the case the judgment of the Court of Appeal for British Columbia should be regarded as a judgment upon a motion for a new trial, within the meaning of section 70 of the Supreme Court Act, R. S. C. 1906, c. 139, and, notice not having been given as thereby provided, there could be no appeal to the Supreme Court of Canada: *Sedgwick* v. *Montreal Light, Heat and Power Co.*, 41 Can. S. C. R. 639, and *Jones* v. *Toronto and York Radial Railway Co.*, Cam. S. C. Prac. 432, referred to.

Per Duff, J., dissenting. — The judgment from which the appeal is asserted was not a judgment upon a motion for a new trial, but a decision on the mreits of the case upon an appeal by way of re-hearing by the Court of Appeal for British Columbia which had before it all the evidence necessary for that purpose. There being no ground on which either party could have demanded a new trial, section 70 of the Supreme Court Act had no application to the appeal to the Supreme Court of Canada: *Sedgwick* v. *Montreal Light, Heat and Power Co.*, 41 Can. S. C. R. 639, followed. Further, the County Court derived its jurisdiction in the case in question from the provisions of section 30, sub-section 1, of the County Courts Act, R. S. B. C. 1911, c. 53, and section 22 of that Act shews that this jurisdiction is concurrent; consequently, the County Court possessed "concurrent jurisdiction" with the Supreme Court of British Columbia within the meaning of section 37*b* of the Supreme Court Act, R. S. C. c. 139, notwithstanding that the word "concurrent" is not employed in either of those sections of the County Courts Act.

Fawcett v. Hatfield, March 3, 1919.

In this case the proceedings commenced in the County Court of Westmoreland in the Province of New Brunswick. The Supreme Court allowed the appeal. No question of jurisdiction was raised on this appeal, and the Supreme Court has frequently said that no conclusion in such cases should be drawn as to the jurisdiction of the Court.

S. 37. *Judgment of a Court of Probate.*

Appellate Jurisdiction.

The Standard Trusts Company v. The Treasurer of the Province of Manitoba, 51 Can. S. C. R. 428.

M., who died in June, 1908, had his domicile in Manitoba and, under a verbal agreement, had erected elevators for L., also domiciled in Manitoba, on lands belonging to the Canadian Pacific Railway Company in the Province of Saskatchewan. Until fully paid for the buildings were to remain the property of M., who was to retain possession and operate the elevators and all net revenues were to be applied in reduction of the price for which they had been constructed. M. also owned lands in Saskatchewan, known as the "Kirkella Lands," which he had agreed to sell to purchasers under agreements under seal, in his possession in Manitoba at the time of his death, by which he remained owner until they had been fully paid for, and then the lands were to be conveyed to the purchasers. The agreements contained no specific covenant to pay the price of the lands. The executors denied the right of the Government of Manitoba to collect succession duties in respect of these debts under the Manitoba Succession Duties Act, R. S. M. 1902, c. 161, s. 5 as re-enacted by the Manitoba statute, 4 & 5 E. VII. c. 45, s. 4.

Per curiam.—The debt due under the contract with L. constituted property within the Province of Manitoba and, as such, was liable for succession duty as provided by the Manitoba Statute. Also, Davies, J., dissenting, that under the agreements for sale of the "Kirkella Lands" a covenant to pay should be implied and, consequently, they were specialty debts which, as such, constituted property within the Province of Manitoba and were liable for succession duty there.

Idington and Anglin, JJ., questioned the jurisdiction of the Supreme Court of Canada under sub-section (*d*) of section 37 of the Supreme Court Act, to entertain an appeal in a matter or proceeding originating in the Surrogate Court of Manitoba.

Anglin, J., suggested that in the proceedings provided for by section 19 of the Manitoba Succession Duties Act, the Judge of the Surrogate Court would act as *persona designata* and that there may not be an appeal from his order to the Supreme Court of Canada.

The judgment appealed from (24 Man. R. 310), was affirmed.

The Trusts and Guarantee Company v. Clarence Arthur Rundle, 52 Can. S. C. R. 114.

Under the terms of section 37 (*d*) of the Supreme Court Act an appeal lies to the Supreme Court of Canada from the

judgment of the Appellate Division of the Supreme Court of Ontario in a case originating in a Surrogate Court of that province. Idington, J., dubitante. S. 38. Appellate Jurisdiction.

On the merits the judgment of the Appellate Division, 32 Ont. L. R. 312, was affirmed.

38. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from the judgment, whether final or not, of the highest Court of final resort now or hereafter established in any province of Canada, whether such Court is a Court of Appeal or of original jurisdiction, where the Court of original jurisdiction is a Superior Court, in the following cases:— p. 111.

(a) Upon any motion to enter a verdict or non-suit upon a point reserved at the trial;

(b) Upon any motion for a new trial;

(c) In any action, suit, cause, matter or other judicial proceeding originally instituted in any Superior Court of equity in any province of Canada other than the Province of Quebec, and from any judgment in any action, suit, cause, matter or judicial proceeding, in the nature of a suit or proceeding in equity, originally instituted in any Superior Court in any province of Canada other than the Province of Quebec. R. S. c. 135, s. 24; 54-55 V. c. 25, s. 2.

39. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court:— p. 138.

(a) from the judgment upon a special case, unless the parties agree to the contrary, and the Supreme Court shall draw any inference of fact from the facts stated in the special case which the Court appealed from should have drawn;

(b) from the judgment upon any motion to set aside an award or upon any motion by way of appeal from an award made in any Superior Court in any of the provinces of Canada other than the Province of Quebec;

(c) from the judgment in any case of proceedings for or upon a writ of habeas corpus, certiorari or prohibition not arising out of a criminal charge;

(d) in any case or proceeding for or upon a writ of mandamus; and,

S. 39. Appellate Jurisdiction.

(c) in any case in which a by-law of a municipal corporation has been quashed by a rule or order of Court or the rule or order to quash has been refused after argument. R. S. c. 135, s. 24; 54-55 V. c. 25, s. 2.

39 (b).

p. 142. **Trustees Grosvenor St. Presbyterian Church v. Toronto, Dec. 12, 1918.**

This was an action begun by an originating summons to recover a sum of money payable under an award. It was held by the Registrar that the appeal did not lie under section 39 of the Supreme Court Act as this was not "a judgment on a motion to set aside an award or by way of appeal from an award," but that an appeal did lie under section 36, as it was a final judgment of the highest Court of final resort in a case which originated in a Superior Court.

See Appendix C. 4.

The Canadian Northern Quebec Railway Company v. Alexander Naud, 48 Can. S. C. R. 242.

On an arbitration respecting compensation to be paid for lands taken under the Railway Act, R. S. C. 1906, c. 37, the arbitrators had fixed a day for their award according to the provisions of section 204. After some proceedings before them it was arranged, for the convenience of counsel for the parties, that further proceedings should be suspended until the return of counsel, who were obliged to be present at the sittings of the Judicial Committee of the Privy Council, and nothing further was done until after the return of counsel from abroad at a date later than the time so fixed for the award. The arbitrators had not prolonged the time for making the award, but upon reassembling after the day originally fixed had passed, they fixed a later date for that purpose. The company's arbitrator and counsel then refused to take part in any subsequent proceedings, and the two remaining arbitrators continued the hearing and made an award in favor of the claimant greater than that offered by the company for the lands expropriated. In an action by the company to have the award set aside and for a declaration that the sum offered should be the compensation payable for the lands,

Held, Fitzpatrick, C.J., and Anglin, J., dissenting, that, in the circumstances of the case, the company should not be permitted to object to the manner in which the arbitrators had proceeded in prolonging the time and making the award. The

appeal from the judgment of the Court of King's Bench (Q. R. 8. 39 22 K. B. 221), declaring the award to have been validly made was, consequently, dismissed with costs. Appellate Jurisdiction.

In the above case a motion to affirm the jurisdiction of the Court was made to the Registrar shortly after the security had been approved by the Court below, and the application was granted. No appeal was taken from the Registrar's order nor was any exception taken to the jurisdiction of the Court at the argument on the merits.

Dame Alexina Forget v. The Lachine, Jacques Cartier & Maisonneuve Rly. Co., May 4, 1915.

Motion by way of appeal from an order of the Registrar refusing to affirm the jurisdiction of the Court.

Pursuant to the provision of the Railway Act arbitrators were appointed to determine the compensation to be paid to the plaintiff for certain lands expropriated for the purpose of the railway.

The arbitrators awarded $620.

The plaintiff dissatisfied with the award brought an action in the Superior Court of Quebec to set aside the award. The action was dismissed at the trial. This was affirmed on appeal to the Court of King's Bench.

It was held by the Registrar that there was no jurisdiction; that the determination of the action would not finally affect the title of the property expropriated, as if the award was set aside, it would simply mean that new proceedings under the Railway Act would have to be taken.

The motion was dismissed with costs.

(See Appendix C. 6.)

Cassidy v. City of Moosejaw, March 5th and 26th, 1917.

The plaintiff was the owner of certain lots in the City of Moosejaw abutting upon a number of streets, one of which was Grey Street. Under an agreement between the city and the Canadian Pacific Railway, the former agreed to close part of Grey Street, which had the effect of cutting the plaintiff's lots from all exit to the south. The plaintiff claims $2,000 compensation, which the city refused. Whereupon the plaintiff, dissatisfied with the amount offered, proceeded to have the compensation determined by arbitrators under the provisions of the City Act, chapter 16, Statutes of Saskatchewan, 1915.

The arbitrator found in favor of the plaintiff for $400. The city appealed to the Supreme Court of the province, which dismissed the appeal. The city now desired to appeal to the

S. 39. Appellate Jurisdiction.

Supreme Court of Canada, and moved for leave to appeal or to affirm jurisdiction. The appellant relied on section 39, sub-section 6 of the Supreme Court Act, which is as follows:—

"Except as hereinafter otherwise provided an appeal shall lie to the Supreme Court from the Judge or Court upon any motion to set aside an award or upon any motion by way of appeal from an award made in any Superior Court in any of the provinces of Canada other than the Province of Quebec."

Held, that the Supreme Court of Canada had jurisdiction, but as the application to affirm should have been made in Chambers to the Registrar the motion was granted without costs.

(See Appendix C. 7.)

39 (c).

p. 150. **Ernest Bouchard v. Sorgius, 55 Can. S. C. R. 324.**

The words "where rights in future might be bound," contained in sub-section (*b*) of section 46 of the Supreme Court Act, apply to the whole sub-section: *Olivier* v. *Jolin*, 55 Can. S. C. R. 41, followed.

Per Davies, Idington, Duff and Anglin, JJ.—Section 39 of the Supreme Court Act, giving an appeal to the Supreme Court in cases of prohibition, is limited and controlled by section 46 of the same Act: *Desormeaux* v. *The Village of Ste. Thérèse* 43 Can. S. C. R. 82, followed.

Per Fitzpatrick, C.J.—No appeal lies to the Supreme Court of Canada from the judgment of a Court of the Province of Quebec rendered upon an application for a writ of prohibition against proceeding with the hearing of a criminal charge: *Gaynor and Green* v. *The United States of America*, 36 Can. S. C. R. 247, followed.

Lachine Jacques Cartier Rly. Co. v. Molson, 23rd Dec., 1914.

In this case the appellants had given notice of expropriation of certain lands required for railway purposes. Arbitrators were duly appointed pursuant to the Railway Act. Before the award was made the railway company presented a petition to the Superior Court for a writ of prohibition against the arbitrators and the property owner ordering the discontinuance of all arbitration proceedings on the ground that they were illegal, null and void. The writ was quashed by the Superior Court and this was affirmed by the Court of Review. The railway company then appealed to the Supreme Court of Canada, and the respondent moved to quash for want of jurisdiction.

The motion was granted. The Chief Justice, with whom Sir Louis Davies and Idington, JJ., concurred, held that the decision of *Desormeaux* v. *Ste. Thérèse*, 43 S. C. R. 82, which was an appeal in a matter of prohibition from the Court of King's Bench of the Province of Quebec, was equally applicable to appeals from the Court of Review, and that the jurisprudence of the Supreme Court both in matters of prohibition and in injunctions that no appeal will lie under section 46 unless the matter in controversy in the action is one directly and not collaterally comes within the specific terms of that section, which has been held to apply to appeals from the Court of King's Bench, also applies to the Court of Review.

(See Appendix C. 8.)

S. 39. Appellate Jurisdiction.

39 (d).

Doherty (Attorney-General of Canada) v. Levis, March 26, 1917. p. 162.

The Minister of Justice of Canada applied under article 933 of the Code of Civil Procedure, to a Superior Court Judge for a *mandamus* to compel the defendant to supply water to certain public buildings in the City of Levis. According to article 933, in a proceeding of this character the writ of summons can only issue upon the authority of a Judge granted upon the presentation of a petition supported by affidavit. The petition was duly filed, and the writ ordered to be issued under the authority of Mr. Justice Dorion. Thereupon, the defendant filed a plea and the petitioner filed an answer. The petitioner then inscribed for "*audition en droit*," setting up his reasons. This application was heard by Mr. Justice Malouin, who gave judgment on the 1st of August, that the parties first proceed generally to the proof. The case then came before Chief Justice Sir François Lemieux on the 10th day of October, 1916, who recites that the Court having examined the procedure and proof of record and having heard the parties by their counsel upon the merits, the case having been inscribed for "*en quête*," and on the merits at the same time, concludes as follows:—

For these reasons the Court cancels and annuls the said brief of *mandamus*, also "*la requête libellée*" accompanying it.

An appeal was taken from this judgment to the Court of Review, where the judgment below was confirmed on the 31st January, 1917. The plaintiff thereupon appealed to the Supreme Court, and the defendant moved to quash.

Section 39, Supreme Court Act, gives an appeal to the Supreme Court in any proceeding for or on a writ of *mandamus*,

S. 39.

Appellate Jurisdiction.

Section 40 gives an appeal where the judgment of the Court of Review is not appealable to the Court of King's Bench, but is appealable to the Privy Council.

Section 46 limits appeal in the Province of Quebec, but section 47 makes an exception in favor of cases of *mandamus*.

Held, that section 39 of the Supreme Court Act, which gives an appeal, amongst others, in cases of *mandamus*, is governed by section 36, which gives an appeal from the final judgment of the highest Court of final resort, and if that Court is a Court of Review in the Province of Quebec, it is also governed by section 40 of the same Act, which gives an appeal where one would also lie to His Majesty in Council.

Held, also, that in this case the facts would not warrant an appeal to the Privy Council and accordingly no appeal would lie to the Supreme Court.

(See Appendix C. 9.)

La Compagnie des Boulevards, etc., v. La Corporation de Cartierville, Dec. 11, 1916.

The plaintiff sued the defendant to recover $778.52 for municipal taxes and interest, the particulars of which were annexed. The defendant pleaded that according to a by-law of the plaintiff in force, the taxes of the defendant had been fixed for the period in question at $200 per annum, while the lands remained vacant. To this the plaintiff replied that the council had no power to pass the by-law in question, and asked to have the by-law declared null and void. The trial Judge, Mr. Justice Lafontaine, held the by-law to be illegal, and gave judgment for the plaintiff, but pursuant to a retraxit filed only for the sum of $102.74.

The defendant inscribed in review, but the appeal was dismissed with costs. The defendants then appealed to the Supreme Court of Canada, relying on section 39, which gives an appeal in cases in which a by-law of a municipal corporation has been quashed or a rule or order to quash has been refused.

The plaintiff moved to quash for want of jurisdiction. The motion was granted.

(See Appendix C. 10.)

p. 179.

40. In the Province of Quebec an appeal shall lie to the Supreme Court from any judgment of the Superior Court in Review where that Court confirms the judgment of the Court of first instance, and its judgment is not appealable to the Court of King's Bench, but is appealable to His Majesty in Council. 54-55 V. c. 25, s. 2.

Article 68 (3) is amended by Statute of Quebec, 1908, c. 75, so as to read as follows:— S. 40.

Appeals from Court of Review.

"In every other case where the amount or value of the thing demanded exceeds five thousand dollars."

Beauvais v. Genge, 53 Can. S. C. R. 353.

By article 69 of the Quebec Code of Civil Procedure and the third clause of article 68, as amended by 8 E. VII. c. 75, an appeal lies to the Judicial Committee of the Privy Council, in certain cases, from judgments of the Court of Review, where the amount or value of the thing demanded exceeds $5,000. Section 40 of the Supreme Court Act, R. S. C. 1906, c. 139, provides for appeals from the Court of Review to the Supreme Court of Canada, in cases which are not appealable to the Court of King's Bench, but are appealable to the Privy Council.

Held, Anglin, J., dissenting, that the words "the thing demanded" in the third clause of article 68 of the Code of Civil Procedure refer to the *demande* in the action, and not to the amount recovered by the judgment, if they are different; consequently, an appeal lies, in such cases, from the judgments of the Court of Review to the Supreme Court of Canada where the amount or value claimed in the declaration exceeds five thousand dollars: *Allan* v. *Pratt*, 13 App. Cas. 780; *Dufresne* v. *Guevremont*, 26 Can. S. C. R. 216; *Citizens Light and Power Co.* v. *Parent*, 27 Can. S. C. R. 316, discussed; *Town of Outremont* v. *Joyce*, 43 Can. S. C. R. 611, and *Dominion Salvage and Wrecking Co.* v. *Brown*, 20 Can. S. C. R. 203, referred to.

The Canadian Northern Quebec Railway Company v. Gignac, 51 Can. S. C. R. 136.

An action to restrain the flooding of the plaintiff's land from the defendants' railway ditch, was maintained by the Superior Court and an order made directing the railway company to construct the necessary works to cause the trouble to cease within a time mentioned, failing which the plaintiff was authorized to do the works at the company's expense. On an appeal from this judgment, the Court of Review, of its own motion, added more specific directions as to the works to be done and, instead of authorizing the plaintiff to construct the works, in case of default, reserved his recourse for future damages and dismissed the appeal.

Held, that the judgment of the Court of Review had confirmed that of the Court of first instance and, therefore, an

S. 40.

Appeals from Court of Review.

appeal therefrom would lie to the Supreme Court of Canada under the provisions of section 40 of the Supreme Court Act, R. S. C. 1906, c. 139: *Hull Electric Co.* v. *Clement*, 41 Can. S. C. R. 419, followed.

The Montreal Tramways Company v. McGill, 53 Can. S. C. R. 390.

The cost of exhibits (claimed by the action), which may be taxable as costs in the cause between party and party, cannot be added to the amount of the *demande* in order to increase the amount in controversy to the sum or value necessary to give the right of appeal to the Supreme Court of Canada: *Dufresne* v. *Guerremont*, 26 Can. S. C. R. 216, followed.

L'Autorite v. Ibbotson, 57 Can. S. C. R. 340.

Eleven persons joined in actions against a newspaper to recover damages for libel. Their combined claims amounted to more than $5,000, but no one claim amounted to that sum.

Upon an appeal taken from the judgment of the Court of Review the respondent moved to quash for want of jurisdiction, and judgment having been reserved, the motion was granted.

Godbout v. Choquet, March 17, 1919.

The appellant was prosecuted before the respondent, the acting License Commissioner for the District of Montreal, for violation of an anti-treating law of the Province of Quebec. The appellant excepted to the jurisdiction of the Commissioner and petitioned the Superior Court for a writ of prohibition on the ground that the legislation was unconstitutional. The writ of prohibition was quashed and the legislation upheld by one of the Judges of the Superior Court, and his judgment was upheld by the Court of Review. The present appeal was thereupon launched, and the respondent moved to quash, on the ground amongst others, that the case was not one of those appealable to the Judicial Committee. No one showed cause. After hearing counsel for the respondent the motion to quash was granted.

p. 184.

41. An appeal shall lie to the Supreme Court from the judgment of any Court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such Court is or are by provincial or municipal authority authorized to adjudicate, and the judgment appealed from involves the assessment of property at a value of not less than ten thousand dollars. 52 V. c. 37, s. 2.

This section was amended April 12, 1918, by 8-9 G. V. c. 7, S. 41. as follows:—

Assessment appeals.

2. Section forty-one of the said Supreme Court Act is amended by adding thereto the following:—

"Provided that the valuation of the property assessed shall not be varied by the Court unless it is satisfied that in fixing or affirming it, such Court of last resort in the province has proceeded upon an erroneous principle; and, instead of itself fixing the amount of an assessment which in its opinion should be varied, the Court may remit the case to such Court of last resort in the province, to fix the same in accordance with the principle which the Court declares to be applicable."

A further amendment was made by 8-9 G. V. c. 44, which provided that the above amendment made by chapter 7 should not "affect any case pending on the day when the said amending Act was assented to, whether the same was then pending in the Court of original jurisdiction, or in the Supreme Court of Canada, or in any intermediate Court."

Assessment appeals.

Ontario.

R. S. O. 1914, c. 195, ss. 61, 62, provide for Courts of Revision to revise the work of the assessors. Section 72 gives an appeal from the Court of Revision to the County Judge. This judgment is declared final by section 79, except where the assessment amounts to $40,000 or over, when an appeal is given to the Ontario Railway and Municipal Board. A further appeal is given to a Divisional Court of the Supreme Court of Ontario, but such an appeal only lies upon leave granted by the said Divisional Court.

Provision is also made by section 81 for a reference in cases involving $10,000, by way of a stated case by the Lieutenant-Governor-in-Council to the Divisional Court from the judgment of the County Judge.

In the appeal of *Canadian Niagara Power Co. and others* v. *The Municipal Corporation of Stamford*, 50 S. C. R. 168, an appeal was taken to the Supreme Court from the judgment of the Appellate Division, which affirmed an order of the Ontario Railway and Municipal Board dismissing an appeal from the Court of Revision.

When the appeal came on to be heard by the Board, the chairman raised the question of the Board's jurisdiction, in view of the fact that no appeal had been taken to the County Judge,

S. 41.

Assessment appeals.

but on the statement of counsel that they were agreed that the law provided for this as an alternative tribunal to which the parties might resort, the Board proceeded to hear and determine the appeal. No question of jurisdiction was raised in the Supreme Court, and the appeal was disposed of on the merits.

The Township of Cornwall v. The Ottawa and New York Railway Company, 52 Can. S. C. R. 466.

By the Ontario Assessment Act an appeal is given from a decision of the Court of Revision to the County Court Judge with, in certain cases, a further appeal to the Railway and Municipal Board. A railway company took an appeal direct from the Court of Revision to the Board. When the appeal came up for hearing the chairman stated that the Board was without jurisdiction, and the parties joined in a consent to its being heard as if on appeal from the County Court Judge. The Board then heard the appeal and gave judgment dismissing it. The companies applied for and obtained leave to appeal from said judgment, under section 80 of the Assessment Act, which allows an appeal on a question of law only, to the Appellate Division which reversed it. On appeal from the last mentioned judgment to the Supreme Court of Canada,

Held, Fitzpatrick, C.J. and Idington, J., dissenting, that the case was not adjudicated upon by the Board *extra cursum curiæ;* that it came before the Appellate Division and was heard and decided in the ordinary way; an appeal would therefore lie to the Supreme Court under section 41 of the Supreme Court Act.

Per Duff, J.—The decision of the Board that the objection to its jurisdiction could be waived and that it could lawfully hear the appeal from the Court of Revision direct (and affirm or amend the assessment) given at the invitation of both parties pursuant to an agreement between them and acted upon by the Board in hearing the appeal on the merits, and acted on by the Appellate Division, is binding on the parties and not open to question on this appeal: *Ex parte Pratt,* 12 Q. B. D. 334; *Forrest* v. *Harvey,* 4 Bell App. Cas. 197; *Gandy* v. *Gandy,* 30 Ch. D. 57; *Roe* v. *Mutual Loan Fund Association,* 19 Q. B. D. 347; and, consequently, the appellant municipality is precluded from contending on appeal to the Supreme Court of Canada that, in the circumstances, the Appellate Division had no authority under the Assessment Act to declare the assessment illegal.

S. 41.

Assessment appeals.

A railway company, under authority of the Parliament of Canada, built an international bridge over the St. Lawrence River at Cornwall, and have since run trains over it.

Held, that such superstructure supported by piers resting on Crown soil and licensed for railway purposes was not included in the railway property assessable under section 47 of the Ontario Assessment Act, R. S. O. [1914] c. 195; if it is included it is exempt from taxation under sub-section 3 of section 47.

Judgment appealed against (34 Ont. L. R. 55), affirmed.

William Pearce v. The City of Calgary, 54 Can. S. C. R. p. 1.

A provincial statute, providing that judgments of Courts in the province on appeal from decisions of Courts of Revision in respect of assessments for taxation purposes shall be final and conclusive on the matter adjudicated upon thereby, does not circumscribe the appellate jurisdiction given to the Supreme Court of Canada in such matters by section 41 of the Supreme Court Act, R. S. C. 1906, c. 139. *Crown Grain Co.* v. *Day* (1908), A. C. 504, applied.

A District Court Judge, in the Province of Alberta, adjudicating in matters concerning the assessment of property for municipal purposes under the provisions of the North-West Territories Ordinance No. 33, of 1893, as amended by the statutes of Alberta, c. 9 of 1909, and c. 27 of 1913, s. 7, is a "Court of last resort created under provincial legislation" within the meaning of section 41 of the Supreme Court Act, R. S. C. 1906, c. 139, and, consequently, an appeal from the decision lies to the Supreme Court of Canada when it involves the assessment of property at a value of not less than ten thousand dollars: *City of Toronto* v. *Toronto Railway Co.*, 27 Can. S. C. R. 640, referred to as effete: *Canadian Niagara Power Co.* v. *Township of Stamford*, 50 Can. S. C. R. 168, and *Re Heintze, Fleitman* v. *The King*, 52 Can. S. C. R. 15, referred to.

In *Fleitman* v. *The King*, 52 S. C. R. p. 15, the Supreme Court of Canada affirmed the judgment of the Court of Appeal for British Columbia, where the latter Court affirmed a judgment of the Court of Revision with respect to the assessment of certain lands of F. August Heinze.

R. S. B. C. (1911), c. 222 s. 86, provides as follows:—The Lieutenant-Governor-in-Council may from time to time appoint one or more person or persons in any assessment district to be a Court of Revision and Appeal in respect of the

S. 41.

Assessment appeals.

assessment of property and income as aforesaid for such district, and such person or persons shall record the proceedings of the said Court, and deposit such records with the Assessor.

Section 100 provides: Notwithstanding anything contained in this Act, an appeal from the Court of Revision and Appeal shall lie to the Court of Appeal against any action or decision of the said Court of Revision, and also against any omission, neglect, or refusal of the said Court of Revision to hear or decide any matter. The notice of such appeal to the Court of Appeal, the time for bringing the same on and the procedure generally, and the powers of the Court of Appeal in respect of such appeal shall be the same as in the case of an ordinary appeal to the Court of Appeal from any judgment of a Judge of the Supreme Court. In addition to the powers above mentioned, the Court of Appeal shall have all the powers by this Act conferred upon the Court of Revision and Appeal.

Grierson v. City of Edmonton, Feb. 19, 1917; May 2, 1917.

The case disclosed the facts to be as follows. The plaintiff appealed from the judgment of the Court of Revision to the Judge of the District Court of the District of Edmonton, whose judgment by section 347, sub-section 12 of the Edmonton Charter, (Alberta Statutes, 1913, c. 23), was declared to be final and conclusive in every case adjudicated upon, and could only be appealed from by a unanimous vote of the Council. The plaintiff applied to the Council for leave to appeal, but an appeal was refused. He thereupon perfected his security and launched an appeal to the Supreme Court of Canada under section 41, and applied to the Registrar to have the jurisdiction of the Court affirmed, which was granted. The appeal came on to be heard before the Court on the merits, and the appeal was allowed with costs.

King Edward Hotel v. City of Toronto, March 7th, 1917.

In the Province of Ontario the Railway and Municipal Board is the Court of last resort in assessment appeals, except by leave of Divisional Court of the Supreme Court of Ontario. In this case the Divisional Court refused leave, thereupon the Hotel Company appealed to the Supreme Court of Canada, and moved under Rule 1 to affirm the Court's jurisdiction. It was held by the Registrar (Appendix C. 11), following his previous decision in *Grierson* v. *Edmonton*, that the Court had jurisdiction.

Hudson Bay Co. v. The City of Swift Current, June 8, 1917.

The statutes of Saskatchewan gave an appeal in assessment cases from the Court of Revision to the local Government

Board, and the decision of this tribunal is declared to be final. In this case the Registrar held that the decision of the local Government Board was that of a Court of last resort under the terms of section 41, and that the Supreme Court had jurisdiction. S. 41. Assessment appeals.

(See Appendix C. 12.)

Rogers Realty Co. v. The City of Swift Current, March 5th and 25th, 1918, 57 Can. S. C. R. 534.

In this case the Registrar of the Supreme Court followed his judgment in the *Hudson Bay Co.* v. *Swift Current,* and in giving his reasons for judgment Mr. Justice Anglin said, "our jurisdiction to entertain this appeal under section 41 of the Supreme Court Act is unquestionable."

(See Appendix C. 12.)

Grand Trunk Pacific Branch Lines Company v. City of Calgary, Oct. 16, 1917; Nov. 22, 1917.

In this case the Supreme Court of Canada heard and determined an appeal from the judgment of His Honor J. L. Jennison, Judge of the District Court, on an assessment appeal involving more than $10,000.

The Toronto Suburban Rly. Co. v. Thomas H. Everson, 54 Can. S. C. R. 395.

Where the expropriation of land is governed by the provisions of the Ontario Railway Act of 1906, the date for valuation is that of the notice required by section 68 (1). The effect is the same under the Act of 1913, if the land has not been acquired by the railway company within one year from the date of filing the plan, etc.

The compensation for the land expropriated should not be diminished by an allowance for benefit by reason of the railway to the lands not taken, the Ontario Railway Acts making no provision therefor.

On appeal in a matter of expropriation the award should be treated as the judgment of a subordinate Court subject to re-hearing. The amount awarded should not be interfered with unless the appeal Court is satisfied that it is clearly wrong, that it does not represent the honest opinion of the arbitrators, or that their basis of valuation was erroneous.

Where the land expropriated is an important and useful part of one holding and is so connected with the remainder that the owner is hampered in the use or disposal thereof by the

S. 41.

Assessment appeals.

severance, he is entitled to compensation for the consequential injury to the part not taken: *Holditch* v. *Canadian Northern Railway Co.*, 50 Can. S. C. R. 265; [1916] 1 A. C. 536, distinguished.

To estimate the compensation for lands expropriated the arbitrators are justified in basing it on a subdivision of the property if its situation and the evidence respecting it shew that the same is probable.

Held, per Fitzpatrick, C.J. and Anglin, J., that to prove the value of the lands expropriated evidence of sales between the date of filing the plans and that of the notice to the owner is admissible, and also of sales subsequent to the latter date if it is proved that no material change has taken place in the interval.

Brodeur, J., dissenting, held that the damages should be reduced; that the arbitrators should have considered only the market value of the lands established by evidence of recent sales in the vicinity.

p. 187.

42. Except as otherwise provided in this Act or in the Act providing for the appeal, no appeal shall lie to the Supreme Court but from the highest Court of last resort having jurisdiction in the province in which the action, suit, cause, matter or other judicial proceeding was originally instituted, whether the judgment or decision in such action, suit, cause, matter or other judicial proceeding was or was not a proper subject of appeal to such highest Court of last resort: Provided that, an appeal shall lie directly to the Supreme Court without any intermediate appeal beirg had to any intermediate Court of Appeal in the province,—

(a) from the judgment of the Court of original judisdiction by consent of parties;

(b) by leave of the Supreme Court or a Judge thereof from any judgment pronounced by a Superior Court of Equity or by any Judge in equity, or by any Superior Court in any action, cause, matter or other judicial proceeding in the nature of a suit or proceeding in equity; and,

(c) by leave of the Supreme Court or a Judge thereof from the final judgment of any Superior Court of any province other than the province of Quebec in any action, suit, cause, matter or other judicial proceeding originally commenced in such Superior Court. R. S. c. 135, s. 26.

West Vancouver v. Ramsay, 53 S. C. R. 459.

On the facts of this case, although it does not so appear on the Report, leave to appeal was given by the Registrar of the Supreme Court.

S. 42. *Per Saltum* appeals

43. Notwithstanding anything in this Act contained the Court shall also have jurisdiction as provided in any other Act conferring jurisdiction. R. S. c. 135, s. 25.

44. Except as provided in this Act or in the Act providing for the appeal, an appeal shall lie only from final judgments in actions, suits, causes, matters and other judicial proceedings originally instituted in the Superior Court of the Province of Quebec, or originally instituted in a Superior Court in any of the provinces of Canada other than the Province of Quebec. R. S. c. 135, s. 28.

45. No appeal shall lie from any order made in any action, suit, cause, matter or other judicial proceeding made in the exercise of the judicial discretion of the Court or Judge making the same; but this exception shall not include decrees and decretal orders in actions, suits, causes, matters or other judicial proceedings in equity, or in actions or suits, causes, matters or other judicial proceedings in the nature of suits or proceedings in equity instituted in any Superior Court. R. S. c. 135, s. 27.

46. No appeal shall lie to the Supreme Court from any judgment rendered in the Province of Quebec in any action, suit, cause, matter or other judicial proceeding unless the matter in controversy,—

(a) involves the question of the validity of an Act of the Parliament of Canada, or of the legislature of any of the provinces of Canada, or of an Ordinance or Act of any of the councils or legislative bodies of any of the territories or districts of Canada; or,

(b) relates to any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty, or to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound; or,

(c) amounts to the sum or value of two thousand dollars.

2. In the Province of Quebec whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different. R. S. c. 135, s. 29; 54-55 V. c. 25, s. 3; 56 V. c. 29, s. 1.

Judicial proceeding.

Pulos v. Lazanis, 57 Can. S. C. R. 337.

An intervention is a "judicial" proceeding within the meaning of section 46 of the Supreme Court Act.

S. 46.

Quebec appeals.

The matter in controversy, which will determine the jurisdiction of the Supreme Court of Canada, is the amount in issue upon the intervention and not the one originally claimed on the main action: *King* v. *Dupuis*, 28 Can. S. C. R. 388, and *Côté* v. *Richardson Co.*, 38 Can. S. C. R. 11, followed.

Proceedings may commence by petition as well as writ.

Turgeon v. Francois-Xavier St. Charles, 48 Can. S. C. R. p. 473.

A cause, matter or judicial proceeding originating on petition to a Judge in Chambers, in virtue of articles 875 and 876 of the Quebec Code of Civil Procedure, is appealable to the Supreme Court of Canada where the subject of the controversy amounts to the sum or value of two thousand dollars.

It is inconsistent with the policy of the Quebec License Law, R. S. Q. 1909, that the ownership of a license to sell intoxicating liquors should be vested in one person while the license is held in the name of another. An agreement having that effect is void inasmuch as it establishes conditions contrary to the policy of the statute. Judgment appealed from (Q. R. 22 K. B. 58), reversed, Brodeur, J., dissenting.

46 (a).

p. 208.

Constitutional Law.

La Corporation de la Paroisse de St. Prosper v. Rodrigue, 56 Can. S. C. R. 157.

A municipal by-law, forbidding the opening of restaurants and the sale therein of any merchandise on Sundays, is *ultra vires*, as it deals with the observance of Sunday or the Lord's Day: *Ouimet* v. *Bazin*, 46 Can. S. C. R. 502, followed.

Geracimo v. Joubert, Feb. 19, 1917.

In this case a motion was made to the Court to quash the appeal for want of jurisdiction. This action was brought by the plaintiff, Joubert, an author, to recover $1,840 with double costs, including costs of exhibits, $119.25. The action arose through the presentation by the defendants at a Montreal theatre of certain French comedies. The plea is a general denial. The trial Judge held that the action could only be brought by a society of French lyric authors, of which the plaintiff was a member, which had a regulation to this effect binding on its members, and dismissed the plaintiff's action.

The Court of Appeal reversed this judgment, holding that the case was governed by the Convention of Berne, which gave

a right of action to the author, and thereupon pronounced judgment in his favor for $217. S. 46. Quebec appeals.

The motion was granted.

(See Appendix C. 13.)

46 (b).

Future rights. p. 235.

Louise Olivier v. Jolin, 55 Can. S. C. R. 41.

The words "where rights in future might be bound," contained in sub-section (*b*) of section 46 of the Supreme Court Act, apply to each of the subjects mentioned in the first part as well as those mentioned in the second part of said sub-section: *Lariviere* v. *School Commissioners of Three Rivers*, 23 Can. S. C. R. 723, followed.

Idington and Duff, JJ., contra.

Future rights—Annuity, etc.

The Canadian Pacific Railway Company v. Frank McDonald, 49 Can. S. C. R. 163.

Plaintiff's action under the Quebec Workman's Compensation Act, claimed $450 for loss of earnings, for six months, during incapacity occasioned by personal injuries, and also an annuity of $337 per annum. The plaintiff recovered judgment for the specific amount claimed, and he was also awarded an annuity of $247.50, which might be subject to revision, under the statute. The capitalized value of the annuity would, probably, amount to a sum exceeding $2,000, the appealable limitation fixed by section 46 (c) of the Supreme Court Act, R. S. C. 1906, c. 139.

Held, Davies, J., dissenting, that, in the circumstances of the case, it did not appear that the *demande* amounted to the sum or value of two thousand dollars, within the meaning of section 46 (*c*) of the Supreme Court Act, and, consequently, the Court had no jurisdiction to entertain the appeal: *Talbot* v. *Guilmartin*, 30 Can. S. C. R. 482; *La Cie. d'Aqueduc de la Jeune Lorette* v. *Verrett*, 42 Can. S. C. R. 156; *Lapointe* v. *The Montreal Police Benevolent and Pension Society*, 35 Can. S. C. R. 5, and *Macdonald* v. *Galivan*, 28 Can. S. C. R. 258, referred to.

See *Cromarty* v. *Cromarty*, *infra*, and other cases collected under section 48.

S. 46. *Title to land.*

Quebec appeals.

The City of Quebec v. Lampson, 56 Can. S. C. R. 288.

By an agreement respecting the unexpired term of an emphyteutic lease, it was stipulated that the vendor should be obliged to give to the buyer a deed of sale of all his rights and claims upon the lease when a sum of two hundred dollars had been wholly paid, and thereupon the buyer should enter into full proprietorship of the immoveable (under the terms of Art. 569 C. C.), subject to the payment of the emphyteutic rent.

Held, Anglin, J., dissenting, that the intention of the parties was that the sale was to be deemed perfected by the payment of the sum stipulated, without it being necessary for the buyer to take out a title deed.

Per Anglin, J.—When the payment was made, the buyer would become entitled to a transfer of the vendor's title and would enter into full proprietorship only after such transfer should have been made.

Held, Duff, J., dissenting, that the existence or non-existence of proprietorship of a lot of land held under an emphyteutic lease "relates . . . to . . . title to lands or tenements" within the clause (b) of section 46 of the Supreme Court Act.

The Montarville Land Company v. The Economic Realty, Limited, 54 Can. S. C. R. 140.

The judgment appealed from maintained the plaintiff's action brought to obtain an order that it should not be obliged to pay certain deferred instalments of the price of land sold to it by the defendants with warranty against all hypothecs, save one for $2,000, until the discharge of certain other incumbrances alleged to be registered as affecting the said lands, and for costs of protest, etc., amounting to $33.90. On a motion to quash an appeal taken from this judgment to the Supreme Court of Canada.

Held (Duff, J., taking no part in the judgment), that, as there was no amount in controversy of the sum or value of $2,000, nor any matter in controversy relating to the title to the lands or to matters wherein future rights thereto might be bound, the Supreme Court of Canada had no jurisdiction to entertain the appeal under the provisions of section 46, subsections *b* and *c* of the Supreme Court Act, R. S. C. 1906, c. 139: *Carrier* v. *Sirois*, 36 Can. S. C. R. 221, applied.

Weiss v. Silverman, February 4, 1919.

This was an action arising out of certain insolvency proceedings, in which the plaintiff (appellant) was a judgment creditor,

holding hypothecs upon the insolvent's immovable property; while the defendant (respondent), was a privileged creditor, who had installed certain plumbing in a building on the lands covered by the plaintiff's hypothecs. The plaintiff brought an action in the Superior Court, pursuant to Art. 777, C. C. P., claiming against defendant amongst other things, that the defendant's privilege be declared null and void, and its registration cancelled, and that the prothonotary in the insolvency proceedings be ordered not to collocate the defendant for the sum of $7,375 claimed by him, or for any sum. A motion before the Registrar to affirm the jurisdiction of the Court was granted. (See Apendix C. 14.) The appeal was subsequently heard on the merits.

S. 46 Quebec appeals.

Title to land—Injunctions.

p. 267.

Bisaillon v. The City of Montreal, Oct. 23rd 1916; Dec. 11th, 1914.

This was a motion by the City of Montreal to quash an appeal for want of jurisdiction. Atwater, K.C., for the motion; St. Germain, K.C., contra.

Upon the application of the plaintiff, Dame Marie Bisaillon, the Honorable Mr. Justice Charbonneau authorized the issue of a writ of injunction against the defendants. The writ was accompanied by a declaration which concluded with a demand that resolutions adopted by the council of the city desisting from certain expropriations be declared illegal and *ultra vires*, and that the council be restrained from proceeding with other expropriations which had been substituted for earlier ones. The trial Judge gave judgment for the plaintiff holding the last resolution of the council illegal, and made the injunction perpetual. His judgment was reversed by the Court of Appeal. It was contended on behalf of the city that the case was governed by the case of *Price* v. *Tanguay*, 42 S. C. R. 133, but held that more than an injunction was asked for by the declaration, and the case was governed by *Murray* v. *Westmount*, 27 S. C. R. 579.

(*Vide* Appendix C. 15.)

Amount in controversy—Injunctions.

Rheaume v. Stuart, 47 Can. S. C. R. 394.

Where the action was brought for an injunction pure and simple, an appeal to the Supreme Court was quashed for want of jurisdiction.

S. 46.

Lachance v. Cauchon, 52 Can. S. C. R. 223.

Quebec appeals.

In an action for an injunction restraining the defendant from carrying on dangerous operations in a quarry, and for $100 damages,

Held, that the Supreme Court of Canada had no jurisdiction to entertain an appeal: *Price Bros.* v. *Tanguay*, 42 Can. S. C. R. 133, and *City of Hamilton* v. *Hamilton Distillery Co.*, 38 Can. S. C. R. 239, referred to. *Shawinigan Hydro-Electric Co.* v. *Shawinigan Water and Power Co.*, 43 Can. S. C. R. 650, distinguished.

The appeal was quashed, but without costs, as the respondent had neglected to move for an order to quash the appeal within the time limited by Supreme Court Rule No. 4.

p. 249.

Boulevards v. Cartierville, Dec. 11, 1916.

This was an action brought by the municipality of Cartierville against a corporation to recover taxes amounting to $778. The defence was that the taxes claimed were too large, as they exceeded a fixed assessment given the corporation by a by-law of the municipality. The latter replied by pleading that the by-law was invalid. The Court after pointing out the lack of harmony in the Supreme Court decisions, followed the most recent one, namely, *Outremont* v *Joyce*, 43 S. C. R. 611, and quashed the appeal with costs.

(See Appendix C. 10.)

Amount in controversy.

Genereux et al. v. Bruneau et al., 47 Can. S. C. R. 400.

Where the judgment below only ordered that there should be a taking of accounts, and there was nothing to shew the amount in controversy exceeded $2,000, an appeal to the Supreme Court was quashed for want of jurisdiction.

The Canadian Northern Ontario Railway Company v. Smith, 50 Can. S. C. R. 476.

A railway company served notice of expropriation of land on the owner, offering $25,000 as compensation. It later served a copy of said notice on S., lessee of said land for a term of ten years. On application to a Superior Court Judge for appointment of arbitrators S. claimed to be entitled to a separate notice and an independent hearing to determine his compensation. The Judge so held and dismissed the application, and his ruling was affirmed by the Court of King's Bench. The company sought to appeal to the Supreme Court of Canada.

Held, per Fitzpatrick, C.J., and Idington, J., following *Canadian Pacific Railway Co.* v. *Little Seminary of Ste. Thérèse*, 16 Can. S. C. R. 606, and *St. Hilaire* v. *Lambert*, 42 Can. S. C. R. 264, that the Superior Court Judge was *persona designata* to hear such applications as the one made by the company; that the case, therefore, did not originate in a Superior Court, and the appeal would not lie. S. 46. Quebec appeals.

Per Duff, J.—The Judge, under section 196 of the Railway Act, acts as *persona designata* and no appeal lies from his orders under that section;—in this case, the application having been made to and the parties having treated the contestation as a proceeding in the Superior Court, which had no jurisdiction, the Court of King's Bench rightly dismissed the appeal from the order refusing to appoint arbitrators; and the appeal to the Supreme Court of Canada being obviously baseless should for that reason be quashed.

Held, per Davies, Duff, Anglin and Brodeur, JJ., that as there was nothing in the record to shew that the amount in dispute was $2,000 or over, and no attempt had been made to establish by affidavit that it was, the appeal failed.

Amount in controversy—By-law.

Robertson v. City of Montreal and the Montreal Autobus Co., 52 S. C. R. 30.

This was an action by a ratepayer to have a by-law of the city declared null, void and set aside. At the argument on the merits, a motion was made by the respondents to quash the appeal for want of jurisdiction on the ground that the matters in controversy did not fall under the section 46 of the Supreme Court Act. No judgment was pronounced on the motion, but the appeal on the merits was dismissed with costs.

By 3-4 G. V. c. 51, s. 5 an amendment to the Supreme Court Act was made to be inserted immediately after section 49, which provides that the amount in controversy may be proved by affidavit. See *infra*, p. 58.

47. Nothing in the three sections last preceding shall in any way affect appeals in Exchequer cases, cases of rules for new trials, and cases of mandamus, habeas corpus, and municipal by-laws. R. S. c. 135, s. 30.

48. No appeal shall lie to the Supreme Court from any judgment of the Court of Appeal for Ontario, unless,—

(a) the title to real estate or some interest therein is in question;

S. 48.

Limitation on appeals

(b) the validity of a patent is affected;

(c) the matter in controversy in the appeal exceeds the sum or value of one thousand dollars exclusive of costs;

(d) the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights; or,

(e) special leave of the Court of Appeal for Ontario or of the Supreme Court of Canada to appeal to such last-mentioned Court is granted.

2 Whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered, if they are different. 60-61 V. c. 34, s. 1.

This section was amended on the 12th April, 1918, by 8-9 G. V. c. 7, as follows:—

"Section forty-eight of the said Supreme Court Act is amended by striking out thereof the words 'the Court of Appeal for Ontario' where the same first occur and substituting therefor 'the highest Court of final resort now or hereafter established in any province of Canada, except the province of Quebec,' and by striking the same words out of clause (e) and substituting therefor the words 'such Court of final resort in the province.'"

A further amendment was made by 8-9 G. V. c. 44, which provided that the above amendment made by chapter 7 should not "affect any case pending on the day when the said amending Act was assented to, whether the same was then pending in the Court of original jurisdiction or in the Supreme Court of Canada or in any intermediate Court."

Limitation on all appeals.

It will be perceived that the effect of the amendment to section 48 of the Act by striking out the words "the Court of Appeal for Ontario" and substituting the words, "Highest Court of Final Resort" has been to make this limitation on appeals to the Supreme Court applicable to all the provinces of Canada, except Quebec. Hereafter we will have no appeals trifling in amount, brought to the Supreme Court, such as in the past were so frequently the subject of adverse comment by the Court.

Interest in lands.

Euphrasia v. St. Vincent, May 1, 1917.

This was an action between two townships. The plaintiffs alleged there was a road allowance between the two municipalities which owing to physical obstructions had been placed largely upon the lands of the plaintiff. The action was brought to recover from the defendants the sum of $721, being one-half of the amount expended in maintaining the highway. On a motion to affirm jurisdiction, the Registrar held that an interest in lands was involved and the Court had jurisdiction under section 48 (*a*). See Appendix C. 16. The appeal was subsequently heard on the merits.

Peters v. Sinclair, 48 Can. S. C. R. 57.

In this case no exception was taken to the jurisdiction of the Court where the action brought was for trespass to lands. The question involved was whether a certain piece of land was a public highway or a private right-of-way.

Bateman v. Scott, 53 Can. S. C. R. 145.

In an action to set aside a conveyance of land by the defendant to his wife as intended to defeat, hinder or delay creditors, no title to real estate is in question to give the Supreme Court of Canada jurisdiction to entertain an appeal under section 48 (*a*) of the Supreme Court Act. Duff and Brodeur, JJ., contra.

Foster v. St. Joseph, Oct. 15, 1917.

In this case the plaintiff brought an action to set aside an assessment of certain lands in so far as it included buildings, plant, etc., and for an injunction to restrain a tax sale. A motion to continue an interim injunction was refused and the action dismissed. This judgment was affirmed by the appellant division of the Supreme Court of Ontario. The plaintiff appealed to the Supreme Court of Canada, and moved before the Registrar to affirm the jurisdiction, relying upon the decisions of this Court coming from the Province of Quebec. It was held that sections 46 and 48 were not analogous where actions affecting lands were involved, and the motion to affirm was refused. An appeal from the Registrar was dismissed by the Court.

(See Appendix C. 17.)

S. 48. *Amount in controversy.*

Limitation on appeals.

p. 275.

Wood v. Gould, Nov. 18, 1915, 53 S. C. R. 51.

In this case a motion was made to quash for want of jurisdiction. The proceedings commenced by an originating notice given under Rule 605 of the Consolidated Rules of Practice, Ontario, which provides that where the rights of the parties depend upon the construction of any contract or agreement, and there are no material facts in dispute, the rights may be determined upon originating notice. The opinion of the Court was asked for the construction of a partnership agreement between William Valance and William A. Wood. The appellant filed on the motion to quash an affidavit which simply affirmed that the amount or value of the matter in controversy exceeded $1,000, and the motion to quash was refused. Subsequently the appeal was heard on the merits.

Aetna Life Ins. Co. v. Sussex, Feb. 26th, 1917.

In this case an action was brought against the insurance company to have a policy of life insurance reinstated for $3.000. Only two premiums of insurance had been paid. The defendants offered to reinstate by a new policy, but required a further premium of $50 as a condition of overseas war service. The judgment below was in favor of the plaintiff, the defendants launched an appeal to the Supreme Court and moved to affirm jurisdiction and in the alternative asked leave to appeal; both applications were refused with costs.

Amount in controversy.

Where there are a number of parties with same interest, and the total amount in controversy exceeds $1,000, but there is no joint liability.

Bennett v. Havelock Electric Light Co., 46 Can. S. C. R. 640.

And see Supreme Court Practice 278.

The Glen Falls Insurance Company v. Adams, 54 Can. S. C. R. 38.

A., by order of a Master, was allowed to prosecute one action against three insurance companies on three separate policies and obtained from the Appellate Division judgment against each for an amount less than $1,000 though the amounts in the aggregate exceeded that sum.

Held, following *Bennett* v. *Havelock Light Co.*, 46 Can. S. C. R. 640, that the defendants were in the same position

as if a separate action had been brought against each and as none of them was made liable for a sum exceeding $1,000 no appeal would lie to the Supreme Court of Canada. S. 48 Limitation on appeals.

L'Autorite v. Ibbotson, 57 S. C. R. 340.

Eleven persons joined in actions against a newspaper to recover damages for libel. Their combined claims amounted to more than $5,000, but no one claim amounted to that sum.

Upon an appeal taken from the judgment of the Court of Review the respondent moved to quash for want of jurisdiction and judgment having been reserved, the motion was granted.

Future rights. p. 275

Cromarty v. Cromarty, Oct. 9, 15, 1917.

In this case an action was brought by a wife against her husband for alimony. The defence was that there had been no legal ceremony of marriage between them. The trial Judge granted the alimony and made a reference to the Master to ascertain the proper allowance to be paid, having regard to the means, station and position in life of the parties, and ordered the defendant to pay to the plaintiff what the Master should find proper to be allowed. The judgment was affirmed by the Appellate Division of Ontario; the defendant then launched an appeal to the Supreme Court when the plaintiff moved to quash for want of jurisdiction. The Supreme Court held that the judgment at the trial was a final judgment, but that the case was governed by *O'Dell* v. *Gregory*, 24 S. C. R. 661, and *Talbot* v. *Guilmartin*, 30 S C. R. 482, where it was determined that no appeal would lie to the Supreme Court in an action for a "*séparation de corps*," although as an incident to the granting of the plaintiff's claim, it involved more than $2,000.

(See Appendix C. 19.)

Special leave.

In re Henderson and the Township of West Nissouri, 46 Can. S. C. R. 627.

The Supreme Court refused leave to appeal as the case raised no question of great public importance where the question was whether a high school district continued to exist within the language of 9 E. VII. c. 91, s. 4.

Upper Canada College v. Toronto, 55 S. C. R. 433.

In this case an action was brought to quash certain by-laws of the City of Toronto. The appellants applied under section

S. 48.

Limitation on appeals.

18 of the Supreme Court Act for leave to appeal, alleging they were parties interested in the opening up of the streets referred to in the by-laws and that their names and the value of their property should be taken into consideration before the by-laws could be legally passed, which had not been done. The city contended that the plaintiffs (appellants) were not presently assessable for any part of the expense, and therefore they were not to be considered as property owners affected by the by-laws, and that they were properly ignored in the proceedings leading up to the passing of the by-laws. The Court considered the case one of public interest, and raised important questions of law, and the leave asked for was granted.

49. No appeal shall lie to the Supreme Court from any final judgment of the Territorial Court of the Yukon Territory, other than upon an appeal from the Gold Commissioner, unless,—

p. 291.

(a) the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a public or general nature affecting future rights;

(b) the title to real estate or some interest therein is in question;

(c) the validity of a patent is affected;

(d) it is a proceeding for or upon a mandamus, prohibition or injunction; or,

(e) the matter in controversy amounts to the sum or value of two thousand dollars or upwards. 2 E. VII. c. 35, s. 4.

"49a. Where the right to appeal depends upon the amount or value of the matter in controversy, and no specific sum is claimed, the amount or value of the matter in controversy may be proved by affidavit or affidavits."

Amount involved proved by affidavit.

This section was added to the Supreme Court Act by 3-4 G. V. c. 51, s. 5. It applies not only to section 49, but also to sections 46 and 48.

It frequently happens that no specific amount of damages is claimed in the writ or statement of claim. Where, therefore, the trial Judge refers the question of damages to a referee, and his judgment is the subject of an appeal, there is nothing on the record to shew the amount in controversy between the parties. The present amendment provides a method for determining this fact.

JUDGMENTS.

Quashing appeals.

50. The Court may quash proceedings in cases brought before it in which an appeal does not lie, or whenever such proceedings are taken against good faith. R. S. c. 135, s. 59.

51. The Court may dismiss an appeal or give the judgment and award the process or other proceedings which the Court, whose decision is appealed against, should have given or awarded. R. S. c. 135, s. 60.

52. On any appeal, the Court may, in its discretion, order a new trial, if the ends of justice seem to require it, although such new trial is deemed necessary upon the ground that the verdict is against the weight of evidence. R. S. c. 135, s. 61.

New trial.

Keiser v. Kalmet, 47 Can. S. C. R. p. 402.

This was an appeal from the judgment of the Supreme Court of Alberta, affirming the judgment at the trial in favour of the plaintiff. The Supreme Court of Canada after hearing counsel on behalf of both parties, ordered a new trial, and directed that all costs up to date should abide the result.

COSTS.

53. The Court may, in its discretion, order the payment of the costs of the Court appealed from, and also of the appeal, or any part thereof, as well when the judgment appealed from is varied or reversed as when it is affirmed. R. S. c. 135, s. 62.

Costs.

MacLaren and others v. The Attorney-General of Quebec and Hanson Bros., 46 Can. S. C. R. 656.

In this case the Court being equally divided in opinion the appeal was dismissed without costs.

By 7-8 G. V. c. 23, the following amendment was made to the Supreme Court Act:—

"A. In any proceeding to which His Majesty is a party, either as represented by the Attorney-General of Canada or otherwise, costs adjudicated to His Majesty shall not be disallowed or reduced upon taxation merely because the solicitor or the counsel who earned such costs, or in respect of whose services the costs are charged, was a salaried officer of the Crown performing such services in the discharge of his duty and remunerated therefor by his salary, or for that or any other

S. 53. Costs.

reason not entitled to recover any costs from the Crown in respect of the services so rendered: Provided that the costs recovered by or on behalf of His Majesty in any such case shall be paid into the Consolidated Revenue Fund.'

AMENDMENTS.

54. At any time during the pendency of an appeal before the Court, the Court may, upon the application of any of the parties or without any such application, make all such amendments as are necessary for the purpose of determining the appeal, or the real question or controversy between the parties, as disclosed by the pleadings, evidence or proceedings. R. S. c. 135, s. 63.

55. Any such amendment may be made, whether the necessity for the same is or is not occasioned by the defect, error, act, default or neglect of the party applying to amend. R. S. c. 135, s. 64.

p. 307.

56. Every amendment shall be made upon such terms as to payment of costs, postponing the hearing or otherwise as to the Court seems just. R. S. c. 135, s. 65.

Zwicker v. Feindel, 29 Can. S. C. R. 527.

An error occurred in the description of certain land which the appellant was purchasing from the respondent. The Court below held that this arose through the fraud of the respondent. There was no allegation of fraud in the appellant's pleading, but redress was asked for on the ground of mistake. The Court held he could not obtain rectification of the deed, which was the relief claimed. Upon appeal to the Supreme Court it was held that by virtue of the power vested in it by the present sections 54, 55 and 56, it could amend the pleadings to conform with the facts as proven, and accordingly reversed the judgment below.

INTEREST.

p. 313.

57. If on appeal against any judgment, the Court affirms such judgment, interest shall be allowed by the Court for such time as execution has been delayed by the appeal. R. S. c. 135, s. 66.

Rowan v. Toronto Rly. Co., June, 1918.

This was a motion to the Court for leave to appeal from the judgment of the Court of Appeal for Ontario in an applica-

tion for an order directing an amendment of the certificate of judgment of this Court, dated Oct. 3rd, 1899. S. 57. Interest.

The facts shortly were these: The plaintiff succeeded in this Court in reversing the judgment of the Court below, and the judgment was settled by the Registrar striking out a clause in the draft minutes which provided that the appellant should have judgment for interest at 6 per cent. from the date of the judgment as entered in the Court below. This clause providing for interest was struck out because under the rules in Ontario, in the Registrar's opinion, the judgment carried interest without any special mention. When the judgment was entered by the appellant in the Court below the local Registrar allowed interest. From his ruling an appeal was taken, but the appeal stood for nearly nineteen years, when at last the Court of Appeal held that the judgment as settled by the Supreme Court did not carry interest. The plaintiff then applied for relief to the Supreme Court.

(See Appendix C. 18.)

Francis v. Allen, Oct. 15, 1918.

Where an action is brought upon a contract which provides for interest, it frequently becomes important to determine the date at which the judgment shall be taken as entered, as the statutory interest on the judgment may be much lower than that called for by the contract. As the Supreme Court gives the judgment which should have been given at the trial, a judgment which directs that the judgment delivered at the trial should be set aside, and judgment entered for a larger amount, would deprive the plaintiff of the difference between that called for by the contract, and that which a judgment carries if the judgment of the Supreme Court is dated as of the date of the trial judgment. In this case, in settling the minutes of judgment the Registrar ruled that interest should be computed according to the contract up to the date of the judgment of the Supreme Court, and judgment was ordered to be entered in the Court below for such amount. See Rule 48 *infra*.

CERTIFICATE OF JUDGMENT.

58. The judgment of the Court in appeal shall be certified by the Registrar to the proper officer of the Court of original jurisdiction, who shall thereupon make all proper and necessary entries thereof; and all subsequent proceedings may be taken thereupon as if the judgment had been given or pronounced in the said last mentioned Court. R. S. c. 135, s. 67. p. 317.

S. 59.

JUDGMENT FINAL AND CONCLUSIVE.

Appeals to the Privy Council.

59. The judgment of the Court shall, in all cases, be final and conclusive, and no appeal shall be brought from any judgment or order of the Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to His Majesty in Council may be ordered to be heard, saving any right which His Majesty may be graciously pleased to exercise by virtue of his royal prerogative. R. S. c. 135, s. 71.

p. 319.

p. 320. *Admiralty Appeals.*

It is pointed out at p. 331 that it has been held by the Judicial Committee (*Richelieu & Ontario Navigation Co. v. The SS. Cape Breton*, 1907, A. C. 295), that an appeal lies under the Colonial Courts of Admiralty Act, 1890, section 6, in admiralty cases, from the Supreme Court of Canada to His Majesty in Council without leave to appeal being required. Since this decision was given there have been many applications to a Judge of the Supreme Court for an order fixing the bail to be given upon such an appeal, and this has involved a consideration of the Admiralty Rules, which are applicable to the Supreme Court. 53 V. c. 27 (Imperial), known as Colonial Courts of Admiralty Act, 1890, by section 3, authorizes the Legislature of a British possession to declare any Court of unlimited civil jurisdiction to be a Colonial Court of Admiralty. Section 5 provides that the judgment of such Colonial Court shall be subject to the like local appeal as a judgment of the Court in the exercise of its ordinary civil jurisdiction, and goes on to provide that "the Court having cognizance of such appeal shall for the purpose thereof possess all the jurisdiction by the Act conferred upon a Colonial Court of Admiralty." Pursuant to this Act, the Parliament of Canada by 54-55 V. c. 29, constituted the Exchequer Court of Canada to be a Colonial Court of Admiralty. The Exchequer Court Act (R. S. c. 140, s. 82), gives an appeal from its judgments to the Supreme Court of Canada. Both the Exchequer Court and the Supreme Court therefore are Colonial Courts of Admiralty. The Imperial Act by section 7 authorizes Colonial Courts of Admiralty to make rules, and section 16, sub-section 3, provides that in default of colonial rules the Vice-Admiralty Court Rules, 1863, shall so far as applicable, have effect in the Colonial Courts of Admiralty, but so far as such rules "are inapplicable or do not extend, the rules of Court for the exercise by a Court of its original

civil jurisdiction, shall have effect as rules for the exercise by the same Court of the jurisdiction conferred by this Act." The Exchequer Court of Canada has made Admiralty Rules, but the Supreme Court has not. The result is that by virtue of section 16 the English Vice-Admiralty Court Rules of 1863, with the saving provision above mentioned, are the rules in force in the Supreme Court of Canada. In the case of the ship *A. L. Smith* v. *Ontario Gravel Freighting Co.*, June 15th, 1915, an application was made to Sir Louis H. Davies in the Supreme Court for an order fixing bail to be given by the appellants upon an Admiralty appeal to His Majesty in Council. The respondent objected to the application on the ground that more than 30 days had expired since the judgment of the Supreme Court and that the Vice-Admiralty Rule 150 (p. 330) required the application to be made within 30 days. The attention of no one was called to section 16 of the Colonial Courts of Admiralty Act above mentioned, and the learned Judge overruled the objection, holding that, assuming the Imperial Rules had been repealed, an appeal still lay to the Supreme Court within 6 months from the date of the judgment appealed from by virtue of section 6 of the Imperial Act (*s.-s. 2b*). S. 59. Appeals to Privy Council

The writer is of the opinion that the Vice-Admiralty Rules are still in force. These are to be found in the volume of "Statutory Rules and Orders revised to the 31st Dec., 1903 (Imperial), Vol. 2 in the Supreme Court library. Rule 185 of the Vice-Admiralty Rules provides as follows:—

185. The Judge may, on the application of either party, enlarge or abridge the time prescribed by these rules or forms or by any order made under them for doing any act or taking any proceeding, upon such terms as to him shall seem fit, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time prescribed."

These rules were not available when the case of *A. L. Smith* v. *Ontario Gravel Freighting Co.*, above mentioned, was decided. The order made by the learned Judge had the effect of extending the time for bringing the appeal although the application was made after the time prescribed. This was in accordance with the jurisprudence of the Supreme Court (*Gilbert* v. *The King*, 38 S. C. R. 285), but it will be seen that express authority for so doing is now contained in Rule 185.

N. 50.

Appeals to Privy Council.

Concurrent Appeals—Supreme Court and Privy Council.

Salter v. British Columbia Electric Railway Co. and the Dominion Creosoting Co., October 15, 1917.

This case was tried by Mr. Justice Murphy, who gave judgment against the defendants. The defendants appealed to the Court of Appeal, which dismissed the appeal of the Electric Co., but allowed the appeal of the Dominion Creosoting Co., and dismissed the action against it with costs.

Another action had been brought by one Geall, v. the same defendants, arising out of the same state of facts, in which the judgment was against the defendants. These judgments were appealed to the Court of Appeal, which similarly dismissed the appeal of the B. C. Electric, and allowed the appeal of the Creosoting Co. In the Geall case, the B. C. Electric Co. appealed to the Privy Council, and while the Salter appeal was pending in the Supreme Court the appeal to the Privy Council by the B. C. Electric Co. in the Geall case was also pending. The respondents, the Dominion Creosoting Co., moved to stay proceedings in the Supreme Court until after judgment was given by the Privy Council, but the motion was refused.

SPECIAL JURISDICTION.

References by Governor-in-Council.

60. Important questions of law or fact touching,—

(a) the interpretation of the British North America Acts, 1867 to 1886; or,

(b) the constitutionality or interpretation of any Dominion or provincial legislation; or,

(c) the appellate jurisdiction as to educational matters, by the British North America Act, 1867, or by any other Act or law vested in the Governor-in-Council; or,

(d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be executed; or,

(e) any other matter, whether or not in the opinion of the Court ejusdem generis with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question;

may be referred by the Governor-in-Council to the Supreme Court for hearing and consideration; and any question touching any of the matters aforesaid, so referred by the Governor-

in-Council, shall be conclusively deemed to be an important question. S. 60.

Special Jurisdiction.

2. When any such reference is made to the Court it shall be the duty of the Court to hear and consider it, and to answer each question so referred; and the Court shall certify to the Governor-in-Council, for his information, its opinion upon each such question, with the reasons for each such answer; and such opinion shall be pronounced in like manner as in the case of a judgment upon an appeal to the Court; and any Judge who differs from the opinion of the majority shall in like manner certify his opinion and his reasons.

3. In case any such question relates to the constitutional validity of any Act which has heretofore been or shall hereafter be passed by the legislature of any province, or of any provision in any such Act, or in case, for any reason, the government of any province has any special interest in any such question, the Attorney-General of such province shall be notified of the hearing, in order that he may be heard if he thinks fit.

4. The Court shall have power to direct that any person interested, or, where there is a class of persons interested, any one or more persons as representatives of such class, shall be notified of the hearing upon any reference under this section, and such persons shall be entitled to be heard thereon.

5. The Court may, in its discretion, request any counsel to argue the case as to any interest which is affected and as to which counsel does not appear, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance out of any moneys appropriated by Parliament for expenses of litigation.

6. The opinion of the Court upon any such reference, although advisory only, shall, for all purposes of appeal to His Majesty in Council, be treated as a final judgment of the said Court between parties. 54-55 V. c. 25, s. 4; 6 E. VII. c 50, s. 2.

References by Senate or House of Commons.

61. The Court, or any two of the Judges thereof, shall examine and report upon any private bill or petition for a private bill presented to the Senate or House of Commons, and referred to the Court under any rules or orders made by the Senate or House of Commons. R. S. c. 135, s. 38.

S. 62. *Habeas corpus.*

Habeas corpus.

62. Every Judge of the Court shall, except in matters arising out of any claim for extradition under any treaty, have concurrent jurisdiction with the Courts or Judges of the several provinces, to issue the writ of habeas corpus ad subjiciendum, for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of Parliament of Canada.

2. If the Judge refuses the writ or remands the prisoner an appeal shall lie to the Court. R. S. c. 135, s. 32.

Habeas corpus arising out of a criminal charge.

In the Matter of Annie McNutt, 47 Can. S. C. R. 259.

By section 39 (*c*), of the Supreme Court Act an appeal is given from the judgment in any case of proceedings for or upon a writ of *habeas corpus* . . . not arising out of a criminal charge.

Held, per Fitzpatrick, C.J., and Davies and Anglin, JJ., that a trial and conviction for keeping liquor for sale contrary to the provisions of the Nova Scotia Temperance Act are proceedings on a criminal charge, and no appeal lies to the Supreme Court of Canada from the refusal of a writ of *habeas corpus* to discharge the accused from imprisonment on such conviction. Duff, J., contra. Brodeur, J., *hesitante.*

By the Liberty of the Subject Act of Nova Scotia on an application to the Court or a Judge for a writ of *habeas corpus* an order may be made calling on the keeper of the gaol or prison to return to the Court or Judge whether or not the person named is detained therein with the day and cause of his detention. On the return of an order so made, an application for the discharge of the prisoner was refused, and an appeal from this refusal was dismissed by the full Court.

Held, per Idington and Brodeur, JJ., that such order is not a proceeding for or upon a writ of *habeas corpus* from which an appeal lies under said section 39 (*c*).

Per Duff, J.—That the judgment of the full Court was given in a case of proceedings for a writ of *habeas corpus* within the meaning of section 39 (*c*), and that the proceedings did not arise out of a "criminal charge" within the meaning of that provision; but that, on the merits, the appeal ought to be dismissed.

In re George Edwin Gray, 57 Can. S. C. R. 150.

In this case the applicant was in military custody awaiting sentence of a Court Martial for disobedience as a soldier to lawful orders of a superior officer, and a motion in his behalf

was made to Mr. Justice Anglin in Chambers for a writ of *habeas corpus ad subjiciendum* under this section of the Act. The motion was referred by the Judge to the Full Court, and was there disposed of. S. 63. *Habeas corpus*

63. In any habeas corpus matter before a Judge of the Supreme Court, or on any appeal to the Supreme Court in any habeas corpus matter, the Court or Judge shall have the same power to bail, discharge or commit the prisoner or person, or to direct him to be detained in custody or otherwise to deal with him as any Court, Judge or Justice of the Peace having jurisdiction in any such matters in any province of Canada. R. S. c. 135, s. 33. p. 340.

64. On an appeal to the Court in any habeas corpus matter the Court may by writ or order direct that any prisoner or person on whose behalf such appeal is made shall be brought before the Court.

2. Unless the Court so direct it shall not be necessary for such prisoner or person to be present in Court, but he shall remain in the charge or custody to which he was committed or had been remanded, or in which he was at the time of giving the notice of appeal, unless at liberty on bail, by order of a Judge of the Court which refused the application or of a Judge of the Supreme Court. R. S. c. 135, s. 34.

65. An appeal to the Supreme Court in any habeas corpus matter shall be heard at an early day, whether in or out of the prescribed sessions of the Court. R. S. c. 135, s. 35.

Certiorari.

66. A writ of certiorari may, by order of the Court or a Judge thereof, issue out of the Supreme Court to bring up any papers or other proceedings had or taken before any Court, Judge or Justice of the Peace, and which are considered necessary with a view to any inquiry, appeal or other proceeding had or to be had before the Court. R. S. c. 135, s. 36.

Cases removed by Provincial Courts.

67. When the legislature of any province of Canada has passed an Act agreeing and providing that the Supreme Court of Canada shall have jurisdiction in any of the following cases, that is to say:—

(a) Of suits, actions or proceedings in which the parties thereto by their pleading have raised the question of the

S. 67.

Cases removed by Provincial Courts.

validity of an Act of the Parliament of Canada, when in the opinion of a Judge of the Court in which the same are pending such question is material;

(b) Of suits, actions or proceedings in which the parties thereto by their pleadings have raised the question of the validity of an Act of the legislature of such province, when in the opinion of a Judge of the Court in which the same are pending such question is material;

the Judge who has decided that such question is material shall at the request of the parties, and may without such request, if he thinks fit, in any suit, action or proceeding within the class or classes of cases in respect of which such Act so agreeing and providing has been passed, order the case to be removed to the Supreme Court for the decision of such question, whatever may be the value of the matter in dispute, and the case shall be removed accordingly.

2. The Supreme Court shall thereupon hear and determine the question so raised and shall remit the case with a copy of its judgment thereon to the Court or Judge whence it came to be then and there dealt with as to justice appertains.

3. There shall be no further appeal to the Supreme Court on any point decided by it in any such case, nor unless the value of the matter in dispute exceeds five hundred dollars, on any other point in such case.

4. This section shall apply only to cases of a civil nature. R. S. c. 135, ss. 72, 73 and 74.

JURISPRUDENCE GENERALLY.

p. 351. *Concurrent findings of fact.*

Dufresne v. Desforges, 47 Can. S. C. R. 382.

If a defendant has not, in the Courts below, taken exception to want of notice of action, as required by article 88 of the Code of Civil Procedure of Quebec, it is doubtful whether the objection can be urged on an appeal to the Supreme Court of Canada: *Devine* v. *Holloway*, 14 Moo. P. C. 290, referred to.

Where the defendant has not been sued in an action for damages by reason of an act done in the exercise of a public function or duty, the provision of article 88 C. P. Q., as to notice of action against a public officer, has no application.

The Supreme Court of Canada ought not, in ordinary cases, to take into consideration the notes of reasons for judgments in the Courts below which have not been delivered before the settling of the case on the appeal: *Mayhew* v. *Stone*, 26 Can.

S. C. R. 58, followed. In a proper case, however, when the non-delivery of such notes is satisfactorily accounted for, the Court may permit them to be filed and made use of as part of the record on the appeal: *Canadian Fire Insurance Co.* v. *Robinson*, Cout. Dig. 1105, referred to. Jurisprudence. Concurrent findings.

The Court refused to reverse the concurrent findings of fact by the Courts below.

Frith v. The Alliance Investment Company, 49 Can. S. C. R. 384.

In a suit for specific performance of a contract for the sale of lands, an agreement for the re-sale of the lands may be set up as a defence notwithstanding that such re-sale agreement does not satisfy the requirements of the 4th section of the Statute of Frauds. Judgment appealed from (10 D. L. R. 765), affirmed.

Such an agreement for re-sale affords a sufficient reason for refusing a decree for specific performance of the original contract for sale.

The Supreme Court of Canada refused to review the finding of the Courts below that the defendants, while agents for the sale of the property in question, when purchasing it themselves under the contract for re-sale, had discharged their duty towards the plaintiff in regard to disclosure of material facts relating to the value of the property.

Per Davies and Idington, JJ.—Where the parties to a contract come to a fresh agreement of such a kind that the two cannot stand together the effect of the second agreement is to rescind the first.

Findings of jury. p. 363.

Cottingham v. Longman, 48 Can. S. C. R. 542.

Where a case has been properly allowed to go to the jury and there is evidence before them from which they could reasonably draw the conclusion at which they arrived, the verdict should not be disturbed on an appeal.

Judgment appealed from (18 B. C. Rep. 184), affirmed.

Winnipeg Electric Railway Company v. Schwartz, 49 Can. S. C. R. 80.

Where the jury, drawing inferences, adopted one of several theories respecting the determining cause of the accident through which the plaintiff's injuries were sustained, and there was evidence to support their finding, the Court refused to disturb the verdict.

Jurisprudence. Findings of jury.

Omer Lamontagne v. The Quebec Rly., Light, Heat & Power Co., 50 Can. S. C. R. 423.

The remedy given by article 1056 of the Civil Code, in cases of *délit* and *quasi-délit*, was taken away in regard to the classes of persons enumerated in section 3 of the Quebec statute respecting compensation for injuries to workmen, 9 Edw. VII., c. 66, by the limitation in section 15 of that statute (now articles 7323 and 7335 of the Revised Statutes of Quebec, 1909), but the effect of these enactments was not to repeal the provisions of article 1056 C. C., with respect to ascendant relations who were only partially dependent for support on a deceased workman to whom the statute applied. The judgment appealed from (Q. R. 23 K. B. 212), was reversed, Davies and Brodeur, JJ., dissenting.

Per Davies, J., dissenting.—The words " in all cases to which this Act applies," in the Quebec statute respecting compensation for injuries to workmen, 9 E. VII. c. 66, s. 15, have reference to the special classes of employment referred to in the first section of the Act, and not to the classes of persons entitled to compensation thereunder. Consequently, the effect of section 15 is to limit the employers' liability to the compensation prescribed by that Act and to that only.

Where no objection has been taken to the Judge's charge to the jury at the trial, and it does not appear that any substantial prejudice was thereby occasioned, there should not be an order for a new trial under the provisions of articles 498 *et seq.* of the Code of Civil Procedure.

The majority of the Court considered that the amount of damages awarded by the jury was so grossly excessive that there should be a new trial and it was ordered accordingly unless the plaintiff agreed that the verdict should be reduced to an amount mentioned. (See art. 503 C. P. Q.)

Phelan v. The Grand Trunk Pacific Railway Company, 51 Can. S. C. R. 113.

A car attached to a fast-freight train arrived at a station on the railway, in Saskatchewan, during a cold night in the winter; it was equipped with an approved coupling device, as required by section 264 (*c*) of the Railway Act, R. S. C. 1906. c. 37, and, on the arrival of the train, it had been inspected according to the usual practice, and no defect was then found. When the train was being moved for the purpose of cutting out the car, the uncoupling mechanism failed to work and, in consequence the plaintiff, an employee, sustained injuries. Subsequently the coupler was taken apart, and it was then discovered

Jurisprudence. Findings of jury.

that the locking-block was jammed with ice (not visible from the exterior), which had formed inside the chamber and prevented its release by the uncoupling device used to disconnect the car before the train was moved. In an action for damages instituted in the Province of Manitoba, the jury found that the company had been negligent "through lack of proper inspection," and judgment was entered on their verdict. On appeal from the judgment of the Court of Appeal for Manitoba setting aside the verdict and entering judgment for the defendants:—

Held, per Fitzpatrick, C.J., and Davies and Anglin, JJ.—The obligation resting upon the company, both under the statute and at common law, was discharged by the customary inspection of the car which had been made according to what was shewn to be good railway practice, and there was no further duty imposed in regard to unusual conditions not perceivable by the ordinary methods of inspection.

Per Davies and Anglin, JJ.—Viewed as a finding upon a question of fact, the verdict of the jury upon the technical question as to the system of inspection should be set aside as being against evidence: *Jackson* v. *Grand Trunk Railway Co.*, 32 Can. S. C. R. 245; *Jones* v. *Spencer*, 77 L. T. 537; *Metropolitan Asylum District* v. *Hill*, 47 L. T. 29; *Jackson* v. *Hyde*, 28 U. C. Q. B. 294, and *Field* v. *Rutherford*, 29 U. C. C. P. 113, referred to.

Per Anglin, J. (Idington, J., contra).—The defence of common employment, although taken away by legislation in the Province of Saskatchewan, where the injuries were sustained, was available as a defence in the Courts of Manitoba, where the action was brought. The *"Halley,"* L. R. 2 P. C. 193, referred to.

Judgment appealed from, 23 Man. R. 435, affirmed, Idington and Duff, JJ., dissenting.

Per Idington and Duff, JJ., dissenting.—Section 264 of the Railway Act imposes upon railway companies the absolute and continuing duty not only to provide, but also to maintain in efficient use the apparatus thereby required; where it is shewn that the apparatus failed to operate, when used, the onus is upon the railway company, in an action under section 386 of the Railway Act, to shew that there had been a thorough inspection thereof made to ascertain that it was in efficient working order before the train was moved: *Johnson* v. *Southern Pacific Co.*, 25 S. C. Repr. 159, referred to.

Jurisprudence. *Misdirection.*

Misdirection. **Daynes v. The British Columbia Electric Railway Company, 49 Can. S. C. R. 518.**

p. 371.

On the trial of a case it is permissible for a witness to consult a copy of a memorandum respecting circumstances attending the occurrence of an accident, which was made by himself at the time, in order to refresh his memory. The refusal of the trial Judge to permit him to do so is ground for ordering a new trial.

The trial Judge is not justified in withdrawing a case from the jury on the ground that the evidence establishes contributory negligence on the part of a plaintiff unless no other conclusion can be drawn from it.

A motorman in the defendants' employ was injured in a collision with the car ahead of that upon which he was performing his work. The company's operation rules provided that cars operated in the same direction, as "double-headers," unless block signals were in use, should be kept at least five minutes apart, except in closing up at stations; also that, when the view ahead was obscured, cars should be kept under such control that they might be stopped within the range of vision, but the rule was not enforced. The plaintiff, one of the company's motormen, on a foggy night, ran his car into the rear of another car standing at the station he was entering, and sustained injuries for which he claimed damages, alleging a defective system. The defence set up contributory negligence on the part of the motorman, but made no allusion to the breach of these regulations. A judgment, entered on the verdict of the jury in favor of the plaintiff, was set aside by the Court of Appeal on the ground that the injury had resulted in consequence of the plaintiff's disregard of the rules.

Held, that as the rules had not been enforced by the defendants nor set up in their pleadings they could not be relied upon in support of the charge of contributory negligence.

Judgment appealed from (17 B. C. Rep. 498), reversed and a new trial ordered.

Creveling v. The Canadian Bridge Company, 51 Can. S. C. R. 216.

During bridge construction a travelling crane was operated on elevated tracks under a system which did not provide of signals on every occasion when it was set in motion, and it was not provided with guards for the protection of workmen employed

upon the elevated stagings. A signal was given, on starting the crane, at some distance from the workmen; shortly afterwards it came to a momentary stop and moved on again towards the workmen without any further signal and plaintiff was injured. In his action for damages, the plaintiff charged want of proper system and guards. The Court of Appeal set aside a judgment in favor of plaintiff, upon a general verdict by the jury, and ordered a new trial for the purpose of assessing damages under the British Columbia Employers' Liability Act, on the ground that it had been admitted that there was a system in existence which, if properly carried out, would have been sufficient for the protection of the workmen.

Jurisprudence. Misdirection.

Held, that, on a proper appreciation of the evidence, having regard to the course of the trial, the directions of the trial Judge had presented the issues fully to the jury, and, there being evidence to support it, their verdict ought not to have been disturbed. Davies and Anglin, JJ., dissented.

Per Duff and Brodeur, JJ.—Where exception to the directions of the Judge has not been taken at the trial or in the first Court of appeal, it is, in the absence of special circumstances, too late to urge such objections upon a subsequent appeal to a higher Court: *White* v. *Victoria Lumber and Manufacturing Co.* (1910), A. C. 606, followed.

Findings of fact—Where Judge has heard the witnesses. p. 377.

Annable v. Coventry, 46 Can. S. C. R. 573.

The appellant obtained a transfer of lands which had been executed by the registered owner to him through some mistake or inadvertence, and, although he was aware that these lands had been previously transferred by the beneficial owner to the respondent, he registered the transfer and thereby secured a certificate of title therefor in his own name as the owner.

Held, affirming the judgment appealed from (1 West. W. R. 148), that the certificate of title issued to the appellant should be cancelled, under the provisions of the Land Titles Act, R. S. Sask., 1909, c. 41, as having been fraudulently obtained.

Per Anglin, J.—Where error in the findings of the trial Judge can be demonstrated wholly by argument it is the duty of an Appellate Court to review questions of fact even where those findings have been against fraud, and upon oral testimony: *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704; *The "Gairloch,"* [1899] 2 Ir. R. 1, and *Khoo Sit Hok* v. *Lim Thean Tong* [1912] A. C. 323, followed.

Jurisprudence. Misdirection.

The Canadian Pacific Railway Company v. Alexander Kerr, 49 Can. S. C. R. 33.

A pre-emptor of Crown lands, under the provisions of the British Columbia Land Act, R. S. C. 1911, c. 129, who has not forfeited his rights, is entitled to maintain an action for such damages as he has sustained in consequence of the destruction of timber growing upon his pre-empted lands.

As to the quantum of damages, the trial Judge, following *Schmidt* v. *Miller*, 46 Can. S. C. R. 45, held that the respondent was entitled to recover the full value of the standing timber destroyed. All evidence bearing upon the question of respondent's interest was omitted in printing the case on appeal, and the point was not taken in the Court of Appeal or in the appellant's factum on the present appeal. The decision of the Supreme Court of Canada in *Schmidt* v. *Miller* was, subsequently, reversed on appeal to the Privy Council, and the point was raised upon the hearing of the present appeal that the respondent's damages should be reduced in consequence of his limited interest in the timber destroyed.

Held, that, in these circumstances, the contention in respect to the pre-emptor's limited interest in the property destroyed (the evidence bearing upon it having been omitted from the appeal case), was not open for consideration in the Supreme Court of Canada.

The Court refused to disturb findings of the trial Judge, based upon sufficient evidence, or the assessment of damages made by him as limited by section 298 of the Railway Act, R. S. C. 1906, c. 37. The judgment appealed from (12 D. L. R. 425), was affirmed.

His Majesty The King v. Hearn, 55 Can. S. C. R. 562.

The appeal from the judgment of the Exchequer Court of Canada (16 Ex. C. R. 146), was allowed, Fitzpatrick, C.J., dissenting.

Held, where compensation awarded is so clearly and grossly excessive that it is manifest that the correct principles of valuation, though stated in the abstract have not been applied, interference on appeal is not merely warranted, but *ex debito justitiæ*.

Per Idington, J.—The cardinal rule to be observed in expropriation proceedings is to allow the market value only, except in cases where the taking has incidentally damaged the owner's business or other material interests; and the advantages to be derived from the construction of the works for the promotion

of which expropriation is made must be excluded in determining such market value. Jurisprudence. Damages excessive.

Per Brodeur, J.—The indemnity to be paid is the value to the owner of the property expropriated and such value is determined by the advantages, present and future, of the property; but the actual value only of these advantages, at the time of the expropriation, must be taken into consideration.

Per Fitzpatrick, C.J., dissenting. — In an appeal to the Supreme Court from the award of an arbitrator, when the question of value has been fully discussed before him and no mistake of law or fact is alleged, the mere suggestion that the amount of compensation is excessive or inadequate ought rarely to be considered a sufficient ground of objection to the award; and this principle must be applied with even more force in the case of an appeal by the Crown, the Exchequer Court being its own tribunal.

Frederick K. Morrow v. The Ogilvie Flour Mills Company, 57 Can. S. C. R. 403.

In an action claiming damages for breach of contract alleged to be made through the medium of telegrams and letters confirming a verbal agreement, the defence was that there was no completed contract or if there was that it had been terminated by laches of the plaintiff. The trial Judge held that there was an existing contract and awarded the plaintiff the damages claimed, but his judgment was varied by the Appellate Division which set aside the assessment of damages and directed a reference therefor.

Held, per Davies and Anglin, JJ., and Falconbridge, C.J., that, though an appeal lies from the judgment of a Judge at the trial on questions of fact as well as of law, on the former an Appellate Court should not interfere with such decision of the Judge who has seen and heard the witnesses unless there is some good and special reason for doubting its soundness. In this case there was no such reason, and the judgment at the trial should stand.

Held, also, that as the damages were assessed by the trial Judge on the principle laid down in *Roth* v. *Taysen*, 12 Times L. R. 211, and the evidence justified the assessment the judgment should not have been varied.

Brodeur, J., also held that the judgment on the trial should be restored. Idington, J., dissented on the ground that the evidence did not prove the existence of any contract between the parties.

Jurisprudence. Point not taken in Court below.

Judgment of the Appellate Division (41 Ont. L. R. 58; 39 D. L. R. 463), reversed in part.

Point not taken in Court below.

p. 397.

The Montreal Tramways Company v. Seguin, 52 Can. S. C. R. 444.

Per curiam.—Where an order has been made for trial with a jury, according to the provisions of articles 422 *et seq.* of the Code of Civil Procedure of Quebec, and both parties have acquiesced in that form of trial, objection to the right to trial by jury cannot be urged for the first time on an appeal to the Supreme Court of Canada.

An action for damages, under article 1056 of the Civil Code, brought by dependents of a person whose death was caused in consequence of *délit* or *quasi-délit* is an action resulting from personal wrongs within the meaning of articles 421 *et seq.* of the Code of Civil Procedure of Quebec in which there may be trial by jury. Fitzpatrick, C.J., contra.

Per Fitzpatrick, C.J., dissenting.—The right of action given to the dependents, under article 1056 of the Civil Code, is purely statutory, and not a representative right (*see Robinson v. Canadian Pacific Railway Co.* (1892), A. C. 481; consequently the dependents, who have suffered no personal wrongs, are not entitled to trial by jury under the provisions of chapter 21 of the Code of Civil Procedure of Quebec.

Per Idington, Duff and Anglin, JJ.—In his charge to the jury, the Judge is entitled to express his opinion on questions of fact if he does so in such a manner as will not lead the jury to think that they are being given a direction which it would be their duty to follow.

Gagnon v. Belanger, 53 Can. S. C. R. 204.

Where the right to redeem lands conveyed *à droit de rémèré* as security for a loan has not been exercised within the stipulated term, or an extension thereof, the purchaser becomes absolute owner and there is no power in the Courts of the Province of Quebec under which an order may be made which could have the effect of extending the time limited for redemption.

After the expiration of the time limited for redemption of lands conveyed *à droit de réméré*, as security for a loan, the purchaser in a letter written to the vendor, requested payment of the loan before a date mentioned therein and, in default of such payment, insisted upon the rights granted by the conveyance.

Held that the letter might be considered as a promise of re-sale of the lands to the vendor which lapsed on failure to make the payment within the time therein stipulated. Jurisprudence. New point not taken below.

Duff, J. took no part in the decision of the appeal.

Per Fitzpatrick, C.J., and Brodeur, J.—Questions which have not been raised or brought to the attention of the Courts below ought not to be considered on an appeal to the Supreme Court of Canada.

Amending Statute.

Doran v. Jewell, 49 Can. S. C. R. 88.

An Act of Parliament enlarging the right of appeal to the Supreme Court of Canada does not apply to a case in which the action was instituted before the Act came into force: *Williams* v. *Irvine*, 22 Can. S. C. R. 108; *Hyde* v. *Lindsay*, 29 Can. S. C. R. 99, and *Colonial Sugar Refining Co.* v. *Irving*, [1905] A. C. 369, followed.

Boulevard Heights, Limited v. Charles B. Veilleux, 52 Can. S. C. R. 185.

The effect of the amendment to the Alberta Land Titles Act, 6 E. VII. c. 24, by 1 G. V. c. 4, s. 15 (25), adding the seventh sub-section to section 124 of that Act, is to prohibit sales of lands subdivided into lots according to plans of subdivision until after the registration of the plans in the proper land titles office, and also to render any sales made in contravention of the prohibition inoperative.

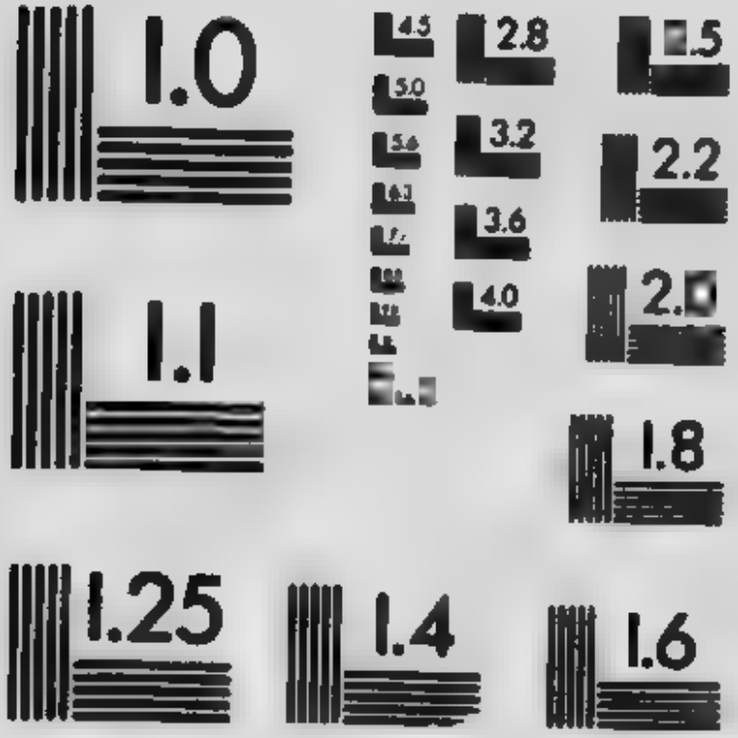
The vindicatory sanction imposed by the statute is directed against the vendor, and where there is no presumption of knowledge of the invalidity on the part of the purchaser he cannot be deemed *in pari delicto* with the vendor, and is not deprived of the right of action to set aside the agreement and recover back moneys paid thereunder.

After the judgment appealed from had been rendered the statute was further amended (5 G. V. c. 2, s. 25), by the addition of sub-section 8 (*a*) providing that the seventh sub-section could not be pleaded or relied upon in any civil action or proceeding by a party to any such agreement when the plan in question had been registered before the action or proceeding was instituted or where it was the duty of the party pleading to make such registration.

Held, that, as the last amending Act was not a statute declaratory of the law as it stood at the time when the judgment appealed from was rendered, and as appeals to the Supreme

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

S. 68.

Procedure in appeals.

Court of Canada are not of the nature of re-hearings to which the principle of the decision in *Quilter* v. *Mapleson*, 9 Q. B. D. 672, applies, the restricting provisions can have no effect upon the decision of the present appeal.

Judgment appealed from (8 West. W. R. 440), affirmed.

PROCEDURE IN APPEALS.

68. Proceedings in appeals shall, when not otherwise provided for by this Act, or by the Act providing for the appeal, or by the general rules and orders of the Supreme Court, be as nearly as possible in conformity with the present practice of the Judicial Committee of His Majesty's Privy Council. R. S. c. 135, s. 39.

p.419.

69. Except as otherwise provided, every appeal shall be brought within sixty days from the signing or entry or pronouncing of the judgment appealed from. 50-51 V. c. 16, s. 57.

Appeal in sixty days.

The City of Montreal v. Layton & Co., Limited, 47 Can. S. C. R. 514.

Per Fitzpatrick, C.J.—In the province of Quebec, in order to constitute a valid seizure of movable property there must be something done by competent authority which has the effect of dispossessing the person proceeded against of the property; notice thereof must be given; an inventory made and a guardian appointed. Where these formalities have not been observed there can be no valid seizure: *Brook* v. *Booker*, 41 Can. S. C. R. 331, referred to.

Per Fitzpatrick, C.J.—Extraordinary powers, conferred by statute, authorizing interference with private property, must be exercised in such a manner that the rights of the owners may not be disregarded: *Bonanza Creek Hydraulic Concession* v. *The King*, 40 Can. S. C. R. 281, and *Riopelle* v. *City of Montreal*, 44 Can. S. C. R. 579, referred to.

Per Fitzpatrick, C.J., and Davies and Idington, JJ.—The authority conferred upon health officers by the Quebec Public Health Act respecting the condemnation, seizure and disposal of food, as being deleterious to the public health, is not final and conclusive in its effect but it is to be exercised subject to the superintending power, orders and control of the Superior Court and the Judges thereof.

Per Anglin and Brodeur, JJ.—The protection afforded by the Quebec Public Health Act to an executive officer of a local

Board of Health cannot be invoked when the officer has apparently not acted under its provisions, but has condemned food, not as the result of his own independent judgment upon its quality, but in carrying out instructions given him by municipal officials purporting to act under other statutory provisions. S. 69. Appeal in (60) days

In the result the finding of the trial Judge that the food in question was fit for human consumption (Q. R. 39 S. C. 520), being supported by evidence, was not disturbed, and the effect of the judgment appealed from (1 D. L. R. 160), was affirmed with a variation of the order making absolute the injunction against the defendant interfering therewith.

In the reasons for judgment of some of the Judges on the motion to quash reported on pp. 424-430, Supreme Court Practice, the opinion is expressed that Mr. Justice Archambault was without jurisdiction to make the order in question because the proceedings at that time were under the jurisdiction and control of the Judicial Committee, but after the judgment of the Supreme Court was pronounced an inquiry was made of the Registrar of the Privy Council in the matter, who stated that there being no record or other material on file in the Privy Council in England, no application or proceedings could be taken in England under the Privy Council rules. In view of this it would appear the order made by Mr. Justice Archambault was within his power.

Also see *Trustees of Grosvenor St. Presbyterian Church* v. *Toronto, supra,* p. 34.

(Appendix C. 4.)

70. No appeal upon a special case, or from the judgment upon a motion to enter a verdict or non-suit upon a point reserved at the trial or from the judgment upon a motion for a new trial, shall be allowed, unless notice thereof is given in writing to the opposite party, or his attorney of record, within twenty days after the decision complained of, or within such further time as the Court appealed from, or a Judge thereof, allows. R. S. c. 135, s. 41.

71. Notwithstanding anything herein contained the Court proposed to be appealed from, or any Judge thereof, may under special circumstances allow an appeal, although the same is not brought within the time hereinbefore prescribed in that behalf.

2. In such case, the Court or Judge shall impose such terms as to security or otherwise as seems proper under the circumstances.

S. 71.

Extending time for appealing.

3. The provisions of this section shall not apply to any appeal in the case of an election petition. R. S. c. 135, s. 42.

Phœnix Land v. Bedard, March 20, 1913.

In this case a motion to quash for want of jurisdiction was made on the ground that the appellant company had been dissolved and was no longer in existence as a corporate entity. The argument of the appeal was allowed to stand to permit of the appellant making an application to the Court below for an extension of time in which to appeal and for the allowance of the security. An order was made by the Court below as asked, which appointed a curator to the defunct corporation, and authorized the appeal to be carried on in his name.

In the Supreme Court, the motion to quash was renewed on the ground that the order of the Court below should not have been made, but the Supreme Court refused to hear argument on the propriety of the order made below and the motion was refused.

Extending time for appealing.

Jukes v. Fisher, 47 Can. S. C. R. 404.

In this case the Court below extended the time for appealing, and granted special leave to appeal. The Supreme Court after hearing counsel for the appellant, without calling upon counsel for the respondent, dismissed the appeal.

72. No writ shall be required or issued for bringing any appeal in any case to or into the Court, but it shall be sufficient that the party desiring so to appeal shall, within the time herein limited in the case, have given the security required and obtained the allowance of the appeal.

2. Whenever error in law is alleged, the proceedings in the Supreme Court shall be in the form of an appeal. R. S. c. 135, s. 43.

73. The appeal shall be upon a case to be stated by the parties, or, in the event of difference, to be settled by the Court appealed from, or a Judge thereof; and the case shall set forth the judgment objected to and so much of the pleadings, evidence, affidavits and documents as is necessary to raise the question for the decision of the Court. R. S. c. 135, s. 44.

Formal Judgment.

It is a common practice in the Province of New Brunswick to appeal from the verdict at the trial in Maritime cases

without the formal judgment at the trial being entered. After consulting with Mr. Justice Anglin, the Registrar has held that in such cases when a further appeal is taken from the Appellate Court of the province to the Supreme Court, the formal judgment must be taken out before the appeal to this Court will be heard.

S. 74. Formal judgment of Court below.

74. The clerk or other proper officer of the Court appealed from shall, upon payment to him of the proper fees and the expenses of transmission, transmit the case forthwith after such allowance to the Registrar, and further proceedings shall thereupon be had according to the practice of the Supreme Court. R. S. c. 135, s. 45.

Security and the staying of execution.

75. No appeal shall be allowed until the appellant has given proper security, to the extent of five hundred dollars, to the satisfaction of the Court from whose judgment he is about to appeal, or a Judge thereof, or to the satisfaction of the Supreme Court, or a Judge thereof, that he will effectually prosecute his appeal, and pay such costs and damages as may be awarded against him by the Supreme Court.

2. This section shall not apply to appeals by or on behalf of the Crown or in election cases, in cases in the Exchequer Court, in criminal cases, or in proceedings for or upon a writ of habeas corpus. R. S. c. 135, s. 46; 50-51 V. c. 16, s. 57.

Security.

Geall v. B. C. Electric, Salter v. B. C. Electric, October 15, 1917, 57 Can. S. C. R. 226.

Anglin, J.—As a term of obtaining a stay of proceedings under the judgments of this Court in these cases to permit of applications for special leave to appeal being made to the Judicial Committee, the defendants filed bonds securing payment of the debts and costs.

The condition of each of the bonds so filed is that if special leave to appeal should not be granted, and the defendants should pay such damages and costs as had been awarded, the obligation should be void, otherwise it should remain in full force and effect.

The plaintiffs now apply on notice for delivery out of these bonds to put the same in suit. They allege and establish by affidavits that special leave to appeal to the Privy Council has been

S. 75. Security.

applied for and refused, and that the debts and costs acknowledged by the bonds to have been awarded to the plaintiffs remain unpaid. In opposing the application counsel for the defendants contends that it is incumbent upon the applicants to shew that they have exhausted their remedies against the defendants by execution before taking any steps towards recovery upon the bonds. With that contention I am unable to agree. The condition upon which the obligation under the bonds was to be avoided has not been fulfilled. The default necessary to establish the liability of the surety according to its terms has been proved, subject, of course, to any other defences that may be open. Daniels Chan. Practice, 6th ed., p. 1931; 8th ed., p. 1624 and note (t). To require the judgment creditors to issue executions and obtain returns of *nulla bona* as a condition of permitting them to put the bonds in suit might involve the incurring of needless expense and entail prejudicial delay. Any possible interest of the surety can be fully protected by the exercise of the discretion of the Court which may try any actions upon the bonds over the costs thereof. The motion should be granted, and the costs of it, so far as I have power so to direct, should be costs in the actions which it is proposed to bring.

Motion granted.

76. Upon the perfecting of such security, execution shall be stayed in the original cause: Provided that,—

(a) if the judgment appealed from directs an assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed, until the things directed to be assigned or delivered have been brought into Court, or placed in the custody of such officer or receiver as the Court appoints, nor until security has been given to the satisfaction of the Court appealed from, or of a Judge thereof, in such sum as the Court or Judge directs, that the appellant will obey the order or judgment of the Supreme Court;

(b) if the judgment appealed from directs the execution of a conveyance or any other instrument, the execution on the judgment shall not be stayed, until the instrument has been executed and deposited with the proper officer of the Court appealed from, to abide the order or judgment of the Supreme Cou

(c) if the judgment appealed from directs the sale or delivery of possession of real property, chattels real or immovables, the execution of the judgment shall not be

stayed, until security has been entered into to the satisfaction of the Court appealed from, or a Judge thereof, and in such amount as the said last mentioned Court or Judge directs, that during the possession of the property by the appellant he will not commit, or suffer to be committed, any waste on the property, and that if the judgment is affirmed, he will pay the value of the use and occupation of the property from the time the appeal is brought until delivery of possession thereof, and also, if the judgment is for the sale of property and the payment of a deficiency arising upon the sale, that the appellant will pay the deficiency; S. 76 Staying execution.

(d) if the judgment appealed from directs the payment of money, either as a debt or for damages or costs, execution thereof shall not be stayed, until the appellant has given security to the satisfaction of the Court appealed from, or of a Judge thereof, that if the judgment or any part thereof is affirmed, the appellant will pay the amount thereby directed to be paid, or the part thereof as to which the judgment is affirmed, if it is affirmed only as to part, and all damages awarded against the appellant on such appeal.

2. If the Court appealed from is a Court of Appeal and the assignment or conveyance, document, instrument, property or thing, as aforesaid, has been deposited in the custody of the proper officer of the Court in which the cause originated, the consent of the party desiring to appeal to the Supreme Court, that it shall so remain to abide the judgment of the Supreme Court, shall be binding on him and shall be deemed a compliance with the requirements in that behalf of this section;

3. In any case in which execution may be stayed on the giving of security under this section, such security may be given by the same instrument whereby the security prescribed in the next preceding section is given. R. S. c. 135, s. 47.

77. When the security has been perfected and allowed, any Judge of the Court appealed from may issue his fiat to the sheriff, to whom any execution on the judgment has issued, to stay the execution, and the execution shall be thereby stayed, whether a levy has been made under it or not.

2. If the Court appealed from is a Court of Appeal, and execution has been already stayed in the case, such stay of execution shall continue without any new fiat, until the decision of the appeal by the Supreme Court.

S. 76.

Staying execution.

3. Unless a Judge of the Court appealed from otherwise orders no poundage shall be allowed against the appellant, upon any judgment appealed from, on which any execution is issued before the Judge's fiat to stay the execution is obtained. R. S. c. 135, s. 48.

78. If, at the time of the receipt by the sheriff of the fiat, or of a copy thereof, the money has been made or received by him, but not paid over to the party who issued the execution, the party appealing may demand back from the sheriff the amount made or received under the execution, or so much thereof as is in his hands not paid over, and in default of payment by the sheriff, upon such demand, the party appealing may recover the same from him in an action for money had and received, or by means of an order or rule of the Court appealed from. R. S. c. 135, s. 49.

79. If the judgment appealed from directs the delivery of perishable property, the Court appealed from, or a Judge thereof, may order the property to be sold and the proceeds to be paid into Court, to abide the judgment of the Supreme Court. R. S. c. 135, s. 50.

Discontinuance of proceedings.

80. An appellant may discontinue his proceedings by giving to the respondent a notice entitled in the Supreme Court and in the cause, and signed by the appellant, his attorney or solicitor, stating that he discontinues such proceedings.

2. Upon such notice being given, the respondent shall be at once entitled to the costs of and occasioned by the proceedings in appeal; and may, in the Court of original jurisdiction, either sign judgment for such costs or obtain an order from such Court, or a Judge thereof, for their payment, and may take all further proceedings in that Court as if no appeal had been brought. R. S. c. 135, s. 51.

Consent to reversal of judgment.

81. A respondent may consent to the reversal of the judgment appealed against, by giving to the appellant a notice entitled in the Supreme Court and in the cause, and signed by the respondent, his attorney or solicitor, stating that he consents to the reversal of the judgment; and thereupon the Court, or any Judge thereof, shall pronounce judgment of reversal as of course. R. S. c. 135, s. 52.

Dismissal for delay.

S. 82.

Dismissal for delay.

82. If an appellant unduly delays to prosecute his appeal, or fails to bring the appeal on to be heard at the first session of the Supreme Court, after the appeal is ripe for hearing, the respondent may, on notice to the appellant, move the Supreme Court, or a Judge thereof in Chambers, for the dismissal of the appeal.

2. Such order shall thereupon be made as the said Court or Judge deems just. R. S. c. 135, s. 53.

Death of parties.

83. In the event of the death of one of several appellants, pending the appeal to the Supreme Court, a suggestion may be filed of his death, and the proceedings may thereupon be continued at the suit of and against the surviving appellant, as if he were the sole appellant. R. S. c. 135, s. 54.

84. In the event of the death of a sole appellant, or of all the appellants, the legal representative of the sole appellant, or of the last surviving appellant, may, by leave of the Court or a Judge, file a suggestion of the death, and that he is such legal representative, and the procedings may thereupon be continued at the suit of and against such legal representative as the appellant.

2. If no such suggestion is made, the respondent may proceed to an affirmance of the judgment, according to the practice of the Court, or take such other proceedings as he is entitled to. R. S. c. 135, s. 55.

85. In the event of the death of one of several respondents, a suggestion may be filed of such death, and the proceedings may be continued against the surviving respondent. R. S. c. 135, s. 56.

86. Any suggestions of the death of one of several appellants or of a sole appellant or of all the appellants or of one of several respondents, if untrue, may on motion be set aside by the Court or a Judge. R. S. c. 135, ss. 54, 55 and 56.

87. In the event of the death of a sole respondent, or of all the respondents, the appellant may proceed, upon giving one month's notice of the appeal and of his intention to continue the same, to the representative of the deceased party, or if no such notice can be given, then upon such notice to the parties interested as a Judge of the Supreme Court directs. R. S. c. 135, s. 57.

S. 88.

Death of parties.

88. In the event of the death of a sole plaintiff or defendant before the judgment of the Court in which an action or an appeal is pending is delivered, and if such judgment is against the deceased party, his legal representatives, on entering a suggestion of the death, shall be entitled to proceed with and prosecute an appeal in the Supreme Court, in the same manner as if they were the original parties to the suit. 52 V. c. 37, s. 3.

89. In the event of the death of a sole plaintiff or sole defendant before the judgment of the Court in which an action or an appeal is pending is delivered, and if such judgment is in favor of such deceased party, the other party, upon entering a suggestion of the death shall be entitled to prosecute an appeal to the Supreme Court against the legal representatives of such deceased party: Provided that the time limited for appealing shall not run until such legal representatives are appointed. 52 V. c. 37, s. 4.

Entry of causes.

90. The appeals set down for hearing shall be entered by the Registrar on a list divided into five parts, and numbered as follows: Number one, Election Cases; Number two, Western Provinces Cases; Number three, Maritime Provinces Cases; Number four, Quebec Province Cases; Number five, Ontario Province Cases; and the Registrar shall enter all election appeals on part numbered one; all appeals from the Yukon Territory and the Provinces of British Columbia, Alberta, Saskatchewan and Manitoba, on part numbered two; all appeals from the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, on part numbered three; all appeals from the Province of Quebec, on part numbered four, and all appeals from the Province of Ontario, on part numbered five; and such appeals shall be heard and disposed of in the order in which they are so entered, unless otherwise ordered by the Court.

Evidence.

91. All persons authorized to administer affidavits to be used in any of the Superior Courts of any province, may administer oaths, affidavits and affirmations in such province to be used in the Supreme Court. R. S. c. 135, s. 91.

92. The Governor-in-Council may, by commission, from time to time, empower such persons as he thinks necessary, within or out of Canada, to administer oaths, and take and receive

affidavits, declarations and affirmations in or concerning any proceeding had or to be had in the Supreme Court. S. 92.

Death of parties.

2. Every such oath, affidavit, declaration or affirmation so taken or made shall be as valid and of the like effect, to all intents, as if it had been administered, taken, sworn, made or affirmed before the Court or before any Judge or competent officer thereof in Canada.

3. Every commissioner so empowered shall be styled "a commissioner for administering oaths in the Supreme Court of Canada." R. S. c. 135, s. 92.

93. Any oath, affidavit, affirmation or declaration concerning any proceeding had or to be had in the Supreme Court administered, sworn, affirmed or made out of Canada shall be as valid and of like effect to all intents as if it had been administered, sworn, affirmed or made before a commissioner appointed under this Act, if it is so administered, sworn, affirmed or made out of Canada before,—

(a) any commissioner authorized to take affidavits to be used in His Majesty's High Court of Justice in England; or,

(b) any notary public and certified under his hand and official seal; or,

(c) a mayor or chief magistrate of any city, borough, or town corporate in Great Britain or Ireland, or in any colony or possession of His Majesty out of Canada, or in any foreign country, and certified under the common seal of such city, borough, or town corporate; or,

(d) a Judge of any Court of superior jurisdiction in any colony or possession of His Majesty, or dependency of the Crown out of Canada; or,

(e) any consul, vice-consul, acting consul, pro-consul or consular agent of His Majesty exercising his functions in any foreign place and certified under his official seal. R. S. c. 135, s. 93.

94. Every document purporting to have affixed, imprinted or subscribed thereon or thereto the signature of any,—

(a) commissioner appointed under this Act; or,

(b) person authorized to take affidavits to be used in any of the Superior Courts of any province; or,

(c) commissioner authorized to receive affidavits to be used in His Majesty's High Court of Justice in England; or,

(d) notary public under his official seal; or,

S. 94. Evidence.

(e) mayor or chief magistrate of any city, borough or town corporate in Great Britain or Ireland, or in any colony or possession of His Majesty out of Canada, or in a foreign country, under the common seal of the corporation; or

(f) Judge of any Court of superior jurisdiction in any colony or possession of His Majesty, or dependency of the Crown out of Canada under the seal of the Court of which he is such Judge; or,

(g) consul, vice-consul, acting consul, pro-consul or consular agent of His Majesty exercising his functions in any foreign place under his official seal;

in testimony of any oath, affidavit, affirmation or declaration having been administered, sworn, affirmed or made by or before him, shall be admitted in evidence without proof of any such signature or seal or of the official character of such person. R. S. c. 135, s. 94.

95. No informality in the heading or other formal requisites of any affidavit, declaration or affirmation, made or taken before any person under any provision of this or any other Act, shall be an objection to its reception in evidence in the Supreme Court, if the Court or Judge before whom it is tendered thinks proper to receive it; and if the same is actually sworn to, declared or affirmed by the person making the same before any person duly authorized thereto, and is received in evidence, no such informality shall be set up to defeat an indictment for perjury. R. S. c. 135, s. 95.

96. If any party to any proceeding had or to be had in the Supreme Court is desirous of having therein the evidence of any person, whether a party or not, or whether resident within or out of Canada, the Court or any Judge thereof, if in its or his opinion it is, owing to the absence, age or infirmity, or the distance of the residence of such person from the place of trial, or the expense of taking his evidence otherwise, or for any other reason, convenient so to do, may, upon the application of such party, order the examination of any such person upon oath, by interrogatories or otherwise, before the Registrar of the Court, or any commissioner for taking affidavits in the Court, or any other person or persons to be named in such order, or may order the issue of a commission under the seal of the Court for such examination.

2. The Court or a Judge may, by the same or any subsequent order, give all such directions touching the time, place

said manner of such examination, the attendance of the witnesses and the production of papers thereat, and all matters connected therewith, as appears reasonable. R. S. c. 135, s. 96.

97. Every person authorized to take the examination of any witness in pursuance of any of the provisions of this Act, shall take such examination upon the oath of the witness or upon affirmation, in any case in which affirmation instead of oath is allowed by law. R. S. c. 135, s. 97.

98. The Supreme Court, or a Judge thereof, may, if it is considered for the ends of justice expedient so to do, order the further examination, before either the Court or a Judge thereof, or other person, of any witness; and if the party on whose behalf the evidence is tendered neglects or refuses to obtain such further examination, the Court or Judge, in its or his discretion, may decline to act on the evidence. R. S. c. 135, s. 98.

99. Such notice of the time and place of examination as is prescribed in the order, shall be given to the adverse party. R. S. c. 135, s. 99.

100. When any order is made for the examination of a witness, and a copy of the order, together with a notice of the time and place of attendance, signed by the person or one of the persons to take the examination, has been duly served on the witness within Canada, and he has been tendered his legal fees for attendance and travel, his refusal or neglect to attend for examination or to answer any proper question put to him on examination, or to produce any paper which he has been notified to produce, shall be deemed a contempt of Court and may be punished by the same process as other contempts of Court: Provided that he shall not be compelled to produce any paper which he would not be compelled to produce, or to answer any question which he would not be bound to answer in Court. R. S. c. 135, s. 100.

101. If the parties in any case pending in the Court consent, in writing, that a witness may be examined within or out of Canada by interrogatories or otherwise, such consent and the proceedings had thereunder shall be as valid in all respects as if an order had been made and the proceedings had thereunder. R. S. c. 135, s. 101.

102. All examinations taken in Canada, in pursuance of any of the provisions of this Act, shall be returned to the Court; and the depositions, certified under the hands of the person or one of the persons taking the same, may, without

S. 102. Evidence.

further proof, be used in evidence, saving all just exceptions. R. S. c. 135, s. 102.

103. All examinations taken out of Canada, in pursuance of any of the provisions of this Act, shall be proved by affidavit of the due taking of such examinations, sworn before some commissioner or other person authorized under this or any other Act to take such affidavit, at the place where such examination has been taken, and shall be returned to the Court; and the depositions so returned, together with such affidavit, and the order or commission, closed under the hand and seal of the person or one of the persons authorized to take the examination, may, without further proof, be used in evidence, saving all just exceptions. R. S. c. 135, s. 103.

104. When any examination has been returned, any party may give notice of such return, and no objection to the examination being read shall have effect, unless taken within the time and in the manner prescribed by general order. R. S. c. 135, s. 104.

General provisions.

105. The process of the Court shall run throughout Canada, and shall be tested in the name of the Chief Justice, or in case of a vacancy in the office of Chief Justice, in the name of the senior puisne Judge of the Court, and shall be directed to the sheriff of any county or other judicial division into which any province is divided.

2. The sheriffs of the said respective counties or divisions shall be deemed and taken to be ex officio officers of the Supreme Court, and shall perform the duties and functions of sheriffs in connection with the Court.

3. In any case where the sheriff is disqualified, such process shall be directed to any of the coroners of the county or district. R. S. c. 135, s. 105; 50-51 V. c. 16, s. 57.

Process of Court.

Stratford v. Mooney, May 16, 1913.

On motion to the Court for a direction to the Registrar to issue process directed to a sheriff in British Columbia, although the appeal to the Supreme Court was from the appellate division of the Supreme Court of Ontario, a discussion occurred in which it was suggested by Mr. Justice Idington that this section and some others were originally part of the Supreme and Exchequer Court Act, R. S. C. 1886, and were subsequently carried into the

Supreme Court Act, although inapplicable to anything except the Exchequer Court. The records of the Supreme Court shew that only in three cases has process issued out of the Supreme Court, and in all of these it was directed to some sheriff of the province from which the appeal came. The motion was subsequently dismissed on the ground that it was made *ex parte*: no notice having been given to the interested parties, and the question being one of considerable importance. S. 105. Process of Court.

106. Every commissioner for administering oaths in the Supreme Court, who resides within Canada, may take and receive acknowledgments or recognizances of bail, and all other recognizances in the Supreme Court. R. S. c. 135, s. 106; 50-51 V. c. 16, s. 57.

107. An order in the Supreme Court for payment of money, whether for costs or otherwise, may be enforced by such writs of execution as the Court prescribes. 50-51 V. c. 16, s. 57.

108. No attachment as for contempt shall issue in the Supreme Court for the non-payment of money only. 50-51 V. c. 16, s. 57.

109. The Judges of the Supreme Court, or any five of them, may, from time to time, make general rules and orders,—

(a) for regulating the procedure of and in the Supreme Court, and the bringing of cases before it from Courts appealed from or otherwise, and for the effectual execution and working of this Act, and the attainment of the intention and objects thereof;

(b) for empowering the Registrar to do any such thing and transact any such business as is specified in such rules or orders, and to exercise any authority and jurisdiction in respect of the same as is now or may be hereafter done, transacted or exercised by a Judge of the Court sitting in chambers in virtue of any statute or custom or by the practice of the Court;

(c) for fixing the fees and costs to be taxed and allowed to, and received and taken by, and the rights and duties of the officers of the Court;

(d) for awarding and regulating costs in such Court in favor of and against the Crown, as well as the subject;

(e) with respect to matters coming within the jurisdiction of the Court, in regard to references to the Court by the Governor-in-Council, and in particular with respect to

S. 109.

investigations of questions of fact involved in any such reference.

Registrar's jurisdiction.

2. Such rules and orders may extend to any matter of procedure or otherwise not provided for by this Act, but for which it is found necessary to provide, in order to ensure the proper working of this Act, and the better attainment of the objects thereof.

3. All such rules which are not inconsistent with the express provisions of this Act shall have force and effect as if herein enacted.

4. Copies of all such rules and orders shall be laid before both Houses of Parliament at the session next after the making thereof. 50-51 V. c. 16, s. 57; 54-55 V. c. 25, s. 4.

110. Any moneys or costs awarded to the Crown shall be paid to the Minister of Finance, and he shall pay out of any unappropriated moneys forming part of the Consolidated Revenue Fund of Canada, any moneys or costs awarded to any person against the Crown. 50-51 V. c. 16, s. 57.

111. All fees payable to the Registrar under the provisions of this Act shall be paid by means of stamps, which shall be issued for that purpose by the Minister of Inland Revenue, who shall regulate the sale thereof.

2. The proceeds of the sale of such stamps shall be paid into the Consolidated Revenue Fund of Canada. R. S. c. 135, s. 111.

RULES OF THE SUPREME COURT.

ORDER AFFIRMING JURISDICTION.

Rule 1.
Order affirming jurisdiction.

Rule 1.—Any party proposing to appeal to the Supreme Court may at the time of his application to have the security approved, when the application is made in the Supreme Court, and in the Yukon Territory within twenty days, and in all other cases within ten days after the security has been approved by the Court below, or has been deposited in Court as provided by the Act giving an appeal, or within such further time as may be allowed, apply to a Judge of the Supreme Court in Chambers, on notice, for an order affirming the jurisdiction of the Court to hear the appeal.

Rule 2.—When the application to allow the security is made in the Supreme Court, the respondent may, on the return of the motion, move to have the security refused on the ground that the Court has no jurisdiction to hear the appeal.

Rule 3.—Any party dissatisfied with the order made upon any such motion, may appeal therefrom to the Court, and upon a notice of such appeal being served, all further proceedings in the main appeal shall be stayed until after the hearing of the said motion, unless a Judge of the Supreme Court shall otherwise order.

Rule 4.—When the appellant has not, within the time above limited, applied to have the jurisdiction of the Court affirmed, any respondent who desires to object to the jurisdiction of the Court to hear the appeal shall, in the Yukon Territory within thirty days, and in all other cases within fifteen days after the security has been approved by the Court below or within such time as may be extended by a Judge of the Supreme Court in Chambers, serve the appellant, his solicitor or agent, with a notice of motion to quash the appeal returnable at the then present, or on the first day of the next ensuing Session of the Court, and in default thereof, in the event of the appeal being quashed the respondent may, in the discretion of the Court, be ordered to pay all or part of the costs of the appeal.

Rule 5.

Stay on motion to quash.

Rule 5.—Upon service of a notice of motion to quash an appeal for want of jurisdiction as hereinbefore provided, all further proceedings in the appeal shall be stayed until the motion has been disposed of, unless a Judge of the Supreme Court shall otherwise order.

CASE TO CONTAIN REASONS FOR JUDGMENT.

Rule 6.—The case provided for by the Supreme Court Act certified under the seal of the Court appealed from, shall be filed in the office of the Registrar, and in addition to the proceedings mentioned in said section, shall invariably contain a transcript of all the opinions or reasons for their judgment delivered by the judges of the Court or Courts below, or a certificate signed by the clerk of such Court or Courts or an affidavit that such reasons cannot be procured, and stating the efforts made to obtain the same.

Reasons handed down later.

See *Dufresne* v. *Desforges*, 47 Can. S. C. R. 382.

CASE TO CONTAIN COPY OF JUDGMENTS BELOW AND ANY ORDER ENLARGING TIME.

Rule 7.—The case shall also contain a copy of all judgments made in the Courts below, and a copy of any order which may have been made by the Court below, or any Judge thereof, enlarging the time for appealing.

CASE MAY BE REMITTED TO COURT BELOW.

Rule 8.—The Court, or a Judge of the Supreme Court in Chambers, may order the case to be remitted to the Court below for correction, or in order that it may be made more complete by the addition thereto of further matter.

MOTION TO DISMISS FOR DELAY.

Rule 9.—If the appellant does not file his case in appeal with the Registrar within forty days after the security required by the Act shall be allowed, he shall be considered as not duly prosecuting his appeal, and the respondent may move to dismiss the appeal pursuant to the provisions of the Act in that behalf.

CERTIFICATE OF SECURITY GIVEN.

Rule 10.

Certificate of security given.

Rule 10.—The case shall be accompanied by a certificate under the seal of the Court below, stating that the appellant has given proper security to the satisfaction of the Court whose judgment is appealed from, or of a Judge thereof, and setting forth the nature of the security to the amount of five hundred dollars as required by the said Act, and a copy of any bond or other instrument by which security may have been given, shall be annexed to the certificate.

CASE TO BE PRINTED AND TWENTY-FIVE COPIES DEPOSITED WITH REGISTRAR.

Rule 11.—The case shall be printed by the party appellant, and twenty-five printed copies thereof shall be deposited with the Registrar for the use of the Judges and officers of the Court.

2. As soon as the case has been printed the solicitor for appellant shall, on demand, deliver to the solicitor for the respondent, three printed copies thereof.

New rules.

The Supreme Court rules were revised on June 19th, 1907, and no amendments were made until the 8th October, 1918, when a general order was passed amending Form 1. and Rules 12, 54 and 57. *Vide* Appendix.

By this general order Rule 12 was repealed and the following substituted:—

Rule 12.—The case shall be in demi-quarto form. It shall be printed on paper of good quality, and on one side of the paper only with the printed pages to the left, and the type shall be pica (but long primer shall be used in printing accounts or tabular matter). The size of the case shall be eleven inches by eight and one-half inches, and every tenth line shall be numbered in the margin. The number of lines on each page shall be 47 or thereabouts and there shall be at least 500 words in every printed page. Where evidence is printed there shall be a headline on each page, giving name of witness, and shewing whether the evidence is examination-in-chief, cross-examination, or as the case may be. All exhibits shall be grouped together and printed in chronological order. All pleadings, judgments and other documents shall be printed in full unless dispensed with by the Registrar. The title page shall contain the name of the Court and province from which the appeal comes, and

Rule 12.

Contents of case.

the style of cause, putting the appellant's name first, as follows:—

A.B.

(Plaintiff or defendant, as the case may be.)
Appellant.

AND

C.D.

(Defendant or plaintiff, as the case may be.)
Respondent.

The names of solicitors and agents must also be added.

The price to be taxed for the printing of 25 copies in the form prescribed by these rules shall not exceed 50 cents for every 100 words for each printed page of pica or its equivalent.

There shall be an index at the beginning of the case, which shall set out in detail the entire contents of the case in four parts, as follows:—

Part I. Each pleading, rule, order, entry or other document with its date, in chronological order.

Part II. Each witness by name, stating whether for plaintiff or defendant, examination-in-chief or cross-examination, or as the case may be, giving the page.

Part III. Each exhibit with its description, date and number, in the order in which they were filed.

Part IV. All judgments in the Courts below, with the reasons for judgment, and the name of the Judge delivering the same.

2. If the appellant desires the case may be printed according to the regulations as to form and type in appeals to His Majesty in Council.

Effect of new rule 12.

The changes made in the old rule are the following: It is now required that the number of lines on each page shall be 47 or thereabouts, and there shall be at least 500 words in every printed page, while only 50c. for every 100 words will be allowed for printing. The object of the amendment was to reduce the cost of printing. Through the carelessness of solicitors it has frequently happened that not more than three or four folios of printed matter were to be found on each page of the case, and as the printers charge by the page, it has resulted that the cost of printing has been unnecessarily increased.

This amendment and the change in the tariff of fees will necessitate a more practical supervision by the solicitors than they have exercised in the past. Rule 12. New Rule. Contents of case.

It will be perceived also that it is now obligatory to give the names of the solicitors and agents on the title page of the case.

2. The original record in the Court appealed from and all exhibits and documentary evidence filed in the cause, shall be transmitted to the Registrar with the certified case provided for in the Act.

Exhibits in chronological order.

Shepard et al. v. Glen Falls Insurance Co., May 6, 1919.

In this case although the appeal was allowed with costs, the costs of printing appeal case were disallowed, because the exhibits were not printed in chronological order.

CASE NOT TO BE FILED UNLESS RULES COMPLIED WITH.

Rule 13.—The Registrar shall not file the case without the leave of the Court, or a Judge, if the foregoing order has not been complied with, nor if it shall appear that the press has not been properly corrected, and no costs shall be taxed for any case not prepared in accordance with this order.

DISPENSING WITH PRINTING ORIGINAL RECORD.

Rule 14.—The Court or a Judge in Chambers may dispense with the printing or copying of any of the documents or plans forming part of the case.

NOTICE OF HEARING OF APPEAL.

Rule 15.—After the filing of the case, a notice of the hearing of the appeal shall be given by the appellant for the next following session of the Court as fixed by the Act, or as specially convened for hearing appeals according to the provisions thereof, if sufficient time shall intervene for that purpose, and if between the filing of the case and the first day of the next issuing session there shall not be sufficient time to enable the appellant to serve the notice as hereinafter prescribed, then such notice of hearing shall be given for the session following the then next ensuing session.

SPECIAL NOTICE CONVENING COURT—FORM OF.

Rule 16.—The notice convening the Court for the purpose of hearing election or criminal appeals, or appeals in matters of

Rule 16.

Notice convening Court.

habeas corpus, or for other purposes under the provision of the Act in that behalf, shall, pursuant to the directions of the Chief Justice or senior puisne Judge as the case may be, be published by the Registrar in the *Canada Gazette*, and shall be inserted therein for such time before the day appointed for such special session as the said Chief Justice or senior puisne Judge may direct, and may be in the form given in form A, of the Schedule to these Rules.

FORM OF NOTICE OF HEARING.

Rule 17.—The notice of hearing may be in the form given in Form B of the Schedule to these Rules.

WHEN TO BE SERVED.

Rule 18.—The notice of hearing shall be served at least fifteen days before the first day of the session at which the appeal is to be heard.

HOW NOTICE OF HEARING TO BE SERVED.

Rule 19.—Such notice shall be served on the attorney or solicitor, who shall have represented the respondent in the Court below, at his usual place of business, or on the booked agent, or at the elected domicile of such attorney or solicitor at the City of Ottawa, and if such attorney or solicitor shall have no booked agent or elected domicile at the City of Ottawa, the notice may be served by affixing the same in some conspicuous place in the office of the Registrar, and mailing on the same day a copy thereof prepaid to the address of such attorney or solicitor.

2. Where the validity of a Statute of the Parliament of Canada is brought in question in an appeal to the Supreme Court, notice of hearing, stating the matter of jurisdiction raised, shall be served on the Attorney-General of Canada.

3. When the validity of a Statute of a Legislature of a Province of Canada is brought in question in an appeal to the Supreme Court, notice of hearing stating the matter of jurisdiction raised shall be served on the Attorney-General of Canada and the Attorney-General of the province.

"THE AGENT'S BOOK."

Rule 20.—There shall be kept in the office of the Registrar of this Court, a book to be called "The Agent's Book," in

which all advocates, solicitors, attorneys and proctors practising in the said Supreme Court may enter the name of an agent (such agent being himself a person entitled to practise in the said Court), at the said City of Ottawa, or elect a domicile at the said City. Rule 20. Agent's book.

SUGGESTION BY APPELLANT OR RESPONDENT WHO APPEARS IN PERSON.

Rule 21.—In case any appellant or respondent who may have been represented by attorney or solicitor in the Court below, shall desire to appear in person in the appeal, he shall immediately after the allowance by the Court appealed from, or a judge thereof, of the security required by the Act, file with the Registrar a suggestion in the form following:—

"A. vs. B.

"I, C. D., intend to appear in person in this appeal.

(Signed) C. D."

IF NO SUGGESTION FILED.

Rule 22.—If no such suggestion be filed, and until an order has been obtained as hereinafter provided for a change of solicitor or attorney, the solicitor or attorney who appeared for any party in the Court below shall be deemed to be his solicitor or attorney in the appeal to this Court.

SUGGESTION BY APPELLANT OR RESPONDENT WHO ELECTS TO APPEAR BY ATTORNEY.

Rule 23.—When an appellant or respondent has appeared in person in the Court below, he may elect to appear by attorney or solicitor in the appeal, in which case the attorney or solicitor shall file a suggestion to that effect in the office of the Registrar, and thereafter all papers are to be served on such attorney or solicitor as hereinbefore provided.

ELECTION OF DOMICILE BY APPELLANT OR RESPONDENT WHO APPEARS IN PERSON.

Rule 24.—An appellant or respondent who appears in person may, by a suggestion filed in the Registrar's office, elect some domicile or place at the City of Ottawa, at which all notices and papers may be served upon him, in which case service at such place of all notices and papers shall be deemed good service.

Rule 25.

Party appearing in person.

SERVICE WHEN APPELLANT OR RESPONDENT APPEARS IN PERSON WITHOUT ELECTING DOMICILE.

Rule 25.—In case the appellant or respondent who shall have appeared in person in the Court appealed from, or who shall have filed a suggestion under Rule 21 shall not, before servi , have elected a domicile at the City of Ottawa, service of all papers may be made by affixing the same in some conspicuous place in the office of the Registrar.

CHANGING ATTORNEY OR SOLICITOR.

Rule 26.—Any party to an appeal may, on an *ex parte* application to the Registrar, obtain an order to change his attorney or solicitor, and after service of such order on the opposite party, all services of notices and other papers are to be made on the new attorney or solicitor.

SUBSTITUTIONAL SERVICE.

Rule 27.—Where personal service of any notice, order or other document is required by these Rules, or otherwise, and it is made to appear to the Court or a Judge in Chambers that prompt personal service cannot be effected, the Court or Judge in Chambers may make such order for substitutional or other service, or for the substitution of notice for service by letter, public advertisement, or otherwise, as may be just.

AFFIDAVITS OF SERVICE.

Rule 28.—Affidavits of service shall state, when, where and how and by whom such service was effected.

FACTUMS TO BE DEPOSITED WITH REGISTRAR.

Rule 29.—At least fifteen days before the first day of the session at which the appeal is to be heard, the parties appellant and respondent shall each deposit with the Registrar, for the use of the Court and its officers, twenty-five copies of his factum or points of argument in appeal.

CONTENTS OF FACTUM.

p. 525.

Rule 30.—The factum or points for argument in appeal shall consist of three parts, as follows:—

Part 1.—A concise statement of the facts.

Part 2.—A concise statement setting out clearly and particularly in what respect the judgment is alleged to be erroneous.

When the error alleged is with respect to the admission or rejection of evidence, the evidence admitted or rejected shall be stated in full. When the error alleged is with respect to the charge of the Judge to the jury, the language of the Judge and the objection of counsel shall be set out *verbatim*. Rule 30. Factum.

Part 3.—A brief of the argument setting out the points of law or fact to be discussed, with a particular reference to the page and line of the case and the authorities relied upon in support of each point. When a statute, regulation, rule, ordinance or by-law is cited, or relied on, so much thereof as may be necessary to the decision of the case shall be printed at length.

McKnight Construction Co. v. Vansickler, March 1, 1915.

The Court calls the attention of counsel to the fact that the sections of the Ontario Statutes discussed were not printed in the factum as required by the Rules, and orders that no costs of the factum in this case should be allowed, and new factums should be deposited.

Linde Canadian Refrigeration Co. v. Saskatchewan Creamery Co., 51 S. C. R. 400 at p. 401, March 8, 1915.

In this case following the next preceding one the Court for the same reason disallowed any costs of factums.

Bruneau v. Genereaux, Nov. 16, 1916.

Upon counsel for respondent suggesting that the notes of Mr. Justice Cross in the Court appealed from, who dissented, had been prepared and filed subsequent to the deposit of his factum in the Supreme Court, leave was granted to file a supplementary factum, dealing with the questions raised in the notes.

HOW TO BE PRINTED.

Rule 31.—The factum or points for argument in appeal shall be printed in the same form and manner as hereinbefore provided for with regard to the case in appeal, and shall not be received by the Registrar unless the requirements hereinbefore contained, as regards the case, are all complied with.

MOTION BY RESPONDENT TO DISMISS APPEAL ON GROUND OF DELAY IN FILING FACTUM.

Rule 32.—If the appellant does not deposit his factum or points for argument in appeal within the time limited by Rule 29, the respondent shall be at liberty to move to dismiss

Rule 33.

Ex parte inscription.

the appeal on the ground of undue delay under the provisions of the Act in that behalf.

APPELLANT MAY INSCRIBE EX PARTE IF FACTUM NOT FILED.

Rule 33.—If the respondent fails to deposit his factum or points for argument in appeal within the said prescribed period, the appellant may set down or inscribe the cause for hearing *ex parte*.

SETTING ASIDE INSCRIPTION EX PARTE.

Rule 34.—Such setting down or inscription *ex parte* may be set aside or discharged upon an application to a Judge in Chambers sufficiently supported by affidavits.

REGISTRAR TO SEAL UP FACTUMS FIRST DEPOSITED.

Rule 35.—The factum or points for argument in appeal first deposited with the Registrar shall be kept by him under seal, and shall in no case be communicated to the opposite party until the latter shall himself bring in and deposit his own factum or points.

INTERCHANGE OF FACTUMS.

Rule 36.—As soon as both parties shall have deposited their said factum or points for argument in appeal, each party shall, at the request of the other, deliver to him three copies of his said factum or points.

REGISTRAR TO INSCRIBE APPEALS FOR HEARING.

Rule 37.—Appeals shall be set down or inscribed for hearing in a book to be kept for that purpose by the Registrar, at least fourteen days before the first day of the session of the Court fixed for the hearing of the appeal. But no appeal shall be so inscribed which shall not have been filed twenty clear days before said first day of said session, without the leave of the Court or a Judge in Chambers.

COUNSEL AT HEARING.

Rule 38.—Except by leave on special grounds no more than two counsel on each side shall be heard on any appeal, and but one counsel shall be heard in reply. Three hours on each side

will be allowed for the argument, and no more, without special leave of the Court. The time thus allowed may be apportioned between the counsel on the same side at their discretion. Rule 38. Foreign counsel.

Foreign counsel. p. 541.

The 88. Hammond v. Coolin, Nov. 10, 1915.

Upon the application of counsel for the appellant, a member of the Massachusetts Bar was invited by the Court to assist the Canadian counsel in the argument.

88. Borghild v. D'Entremont, May 28, 1917.

Counsel for the appellant introduced to the Court a member of the Massachusetts Bar, and requested that he be permitted to address the Court. The Chief Justice remarked that the Court had received valuable assistance in a previous case from the same counsel, and would be pleased to grant the request.

Where counsel also is witness.

In the appeal of the *Ocean Accident and Guarantee Co.* v. *Larose*, a question having arisen as to the propriety of Mr. A. acting as counsel when he had been a witness at the trial, although he had so appeared without objection in the Courts below, and in the distribution of their argument it was proposed that Mr. B., also counsel in the case in the same interest, should alone discuss the evidence, a majority of the Court was of opinion that it was not desirable that Mr. A. should appear as counsel.

POSTPONEMENT OF HEARING.

Rule 39.—The Court may in its discretion postpone the hearing until any future day during the same session, or at any following session.

DEFAULT BY PARTIES IN ATTENDING HEARING.

Rule 40.—Appeals shall be heard in the order in which they have been set down, and if either party neglect to appear at the proper day to support or resist the appeal, the Court may hear the other party, and may give judgment without the intervention of the party so neglecting to appear, or may postpone the hearing upon such terms as to payment of costs or otherwise as the Court shall direct.

Rule 41.

Judgments, how to be signed.

JUDGMENTS—HOW TO BE SIGNED.

Rule 41.—All orders and judgments of the Court shall be settled and signed by the Registrar.

ENTRY OF JUDGMENT.

Rule 42.—The solicitor for the successful party shall obtain an appointment from the Registrar for settling the judgment, and shall serve a copy of the draft minutes and a copy of the appointment upon the solicitor for the opposite party two clear days at least before the time fixed for settling the judgment. The Registrar shall satisfy himself in such manner as he may think fit that service of the minutes of judgment and of the notice of appointment has been duly effected.

Rule 43.—If any party fails to attend the Registrar's appointment for settling the draft of any judgment, the Registrar may proceed to settle the draft in his absence.

Rule 44.—Where the successful party neglects or refuses to obtain an appointment to settle the minutes of judgment, the Registrar may give the conduct of the proceedings to the opposite party.

Rule 45.—The Registrar may adjourn any appointment for settling the draft of any judgment or order to such time as he may think fit, and the parties who attended the appointment shall be bound to attend such adjournment without further notice.

Rule 46.—Notwithstanding the preceding rules, the Registrar shall in any case in which the Court or a Judge may think it expedient, settle any judgment or order without making any appointment, and without notice to any party.

Rule 47.—Any party dissatisfied with the minutes of judgment as settled by the Registrar may move the Court to vary the minutes as settled, upon serving the solicitor for the opposite party with two clear days' notice of his motion, and the said motion shall be brought on for hearing at the nearest convenient session of the Court, but the said motion shall not stay the entry of the judgment, if the Registrar is of the opinion that the motion is frivolous or would unreasonably prejudice the successful party, unless a Judge of the Supreme Court shall otherwise order. Such a motion shall be based only on the ground that the minutes as settled do not in some one or more

respects specified in the notice of motion accord with the judgment pronounced by the Court. Rule 48.

Date of judgment.

Rule 48.—Every judgment shall be dated as of the day on which such judgment is pronounced, unless the Court shall otherwise order, and the judgment shall take effect from that date; provided that by special leave of the Court or a Judge a judgment may be ante-dated or post-dated. See *Interest*, p. 61, *supra*.

Rule 49.—Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same, there shall be indorsed a memorandum in the words or to the effect following, viz: "If you, the within-named A. B., neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same."

ADDING PARTIES BY SUGGESTION.

Rule 50.—In any case not already provided for by the Act, in which it becomes essential to make an additional party to the appeal, either as appellant or respondent, and whether such proceeding becomes necessary in consequence of the death or insolvency of any original party, or from any other cause, such additional party may be added to the appeal by filing a suggestion, which may be in the Form C in the Schedule to these Rules.

SUGGESTION MAY BE SET ASIDE.

Rule 51.—The suggestion referred to in the next preceding Rule may be set aside on motion, by the Court or a Judge thereof.

SERVICE ON NOTICE.

Rule 52.—Notice of the filing of such suggestion shall be served upon the other party or parties to the appeal.

DETERMINING QUESTIONS OF FACT ARISING ON MOTION.

Rule 53.—Upon any motion to set aside a suggestion, the Court or a Judge thereof may in their or his discretion, direct evidence to be taken before a proper officer for that purpose or may direct that the parties shall proceed in the proper Court

Rule 54. Motions.

for that purpose, to have any question tried and determined, and in such case all proceedings in appeal may be stayed until after the trial and determination of the said question.

MOTIONS.

p. 555.

Rule 54.—All interlocutory applications in appeal shall be made by motion, supported by affidavits to be filed in the office of the Registrar. The notice of motion shall be served at least four clear days before the time of hearing. All affidavits and material to be used on a motion shall be filed with the Registrar at least two clear days before the motion is heard. The notice of motion shall set out fully the grounds upon which it is based. In all motions to quash for want of jurisdiction a copy of the pleadings and judgments in the Courts below shall form part of the material filed.

Effect of new rule 54.

By the general order of Oct. 8th, 1918, former Rule 54 was repealed, and the above substituted therefor. The amendment now requires that the notice of motion shall fully set out the grounds on which it is based. The rule will be complied with if the notice of motion refers to an affidavit in which the grounds are set out.

The amendment also requires that where a motion is to quash for want of jurisdiction, a copy of the pleadings and judgments in the Courts below must form part of the material filed.

Copies not always required.

It is not necessary to produce a copy of the pleadings and judgment if the originals are part of the record in the Court below, which is forwarded to the Registrar of the Supreme Court.

NOTICE OF MOTION, HOW SERVED.

Rule 55.—Such notice of motion may be served upon the solicitor or attorney of the opposite party by delivering a copy thereof to the booked agent, or at the elected domicile of such solicitor or attorney to whom it is addressed, at the City of Ottawa. If the solicitor or attorney has no booked agent, or has elected no domicile at the City of Ottawa, or if a party to be served with notice of motion has not elected a domicile at the City of Ottawa, such notice may be served by affixing a copy thereof in some conspicuous place in the office of the Registrar of this Court.

AFFIDAVITS IN SUPPORT OF MOTION.

Rule 56.

Service.

Rule 56.—Service of a notice of motion shall be accompanied by copies of affidavits filed in support of the motion.

Rule 57.—Motions to be made before the Court are to be set down on a list or paper and are to be called before the hearing of the appeals is proceeded with on the first day of each week on which the Court is in session.

Effect of new rule 57.

p. 556.

By the general order of Oct. 8th, 1918, former Rule 57 was repealed and the above substituted therefor. The amendment requires that motions shall be heard on the first day of each week on which the Court is in session.

EXAMINATION ON AFFIDAVIT.

Rule 58.—Any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may, by leave of a Judge in Chambers, serve upon the party by whom such affidavit has been filed, or his solicitor, a notice in writing, requiring the production of the deponent for cross-examination before the Registrar or a commissioner for taking affidavits in the Court; such notice shall be served within such time as the Registrar may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the Court or a Judge in Chambers. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production unless the Registrar so direct.

APPEAL ABANDONED BY DELAY.

Rule 59.—Unless the appeal is brought on for hearing by the appellant within one year next after the security shall have been allowed, it shall be held to have been abandoned without any order to dismiss being required, unless the Court or a Judge shall otherwise order.

INTERVENTION.

Rule 60.—Any person interested in an appeal between other parties may, by leave of the Court or a Judge, intervene therein upon such terms and conditions and with such rights and privileges as the Court or Judge may determine.

Rule 61. Re-hearing.

2. The costs of such intervention shall be paid by such party or parties as the Supreme Court shall order.

RE-HEARING.

Rule 61.—There shall be no re-hearing of an appeal except by the leave of the Court on a special application, or at the instance of the Court.

DISCONTINUANCE.

Rule 62.—When a notice of discontinuance has been given by an appellant to a respondent, the latter shall be entitled to have his costs taxed by the Registrar without any order, unless the notice of discontinuance is served after the appeal has been inscribed for hearing in the Supreme Court. In the latter event, such order shall be made by the Court as to costs and otherwise as to the Court may seem meet.

RULES APPLICABLE TO EXCHEQUER APPEALS.

Rule 63.—The foregoing Rules shall be applicable to appeals from the Exchequer Court of Canada, except in so far as the Exchequer Court Act has otherwise provided.

RULES NOT APPLICABLE TO CRIMINAL APPEALS, NOR HABEAS CORPUS.

Rule 64.—The foregoing Rules shall not, except as hereinbefore provided, apply to criminal appeals, nor to appeals in matters of *habeas corpus* under section 62 of the Act.

CASE IN CRIMINAL APPEALS AND HABEAS CORPUS

Rule 65.—Criminal appeals may be heard on a written case certified under the seal of the Court appealed from and in which case shall be included all judgments and opinions pronounced in the Courts below. The appellant shall also file six type-written or printed copies of the case with a memorandum of the points for argument except in so far as dispensed with by the Registrar.

2. In appeals in *habeas corpus* cases under section 62 of the Act, a printed or typewritten case containing the material before the Judge appealed from, and the judgment of the said Judge, together with a memorandum of the points for argument, except in so far as dispensed with by the Registrar, shall be filed.

WHEN CASE TO BE FILED.

Rule 66.

Filing case.

Rule 66.—In criminal appeals and in appeals in cases of *habeas corpus*, under section 62 of the Act, unless the Court or a Judge in Chambers shall otherwise order, the case shall be filed fifteen clear days before the day of the session of the Court at which the appeal is proposed to be heard.

NOTICE OF HEARING IN CRIMINAL APPEALS AND IN APPEALS IN MATTERS OF HABEAS CORPUS.

Rule 67.—In cases of criminal appeals and appeals in matters of *habeas corpus*, under section 62 of the Act, notice of hearing shall be served at least five days before the day of the session at which the appeal is proposed to be heard.

ELECTION APPEALS.

Rule 68.—Except as otherwise provided by the Dominion Controverted Elections Act, and by the three following Rules, the Supreme Court Rules shall, so far as applicable, apply to appeals in controverted election cases.

Rule 69.—In controverted election appeals the party appellant shall obtain from the Registrar, upon payment of the usual charges therefor, a certified copy of the record or of so much thereof as a Judge in Chambers may direct to be printed, and shall have forty (40) copies of the said certified copy printed in the same form as herein provided for the case in ordinary appeals, and immediately after the completion of the printing shall deliver to the Registrar thirty (30) of such printed copies, twenty-five (25) thereof for the use of the Court and its officers and five (5) thereof for the use of the respondent, and to be handed by the Registrar to the respondent or his solicitor or booked agent upon application made therefor.

2. For printing in election appeals the same fees shall be allowed on taxation as for printing the case in ordinary appeals.

FIXING TIME OF HEARING.

Rule 70.—As soon as the Registrar shall have received the record duly certified by the clerk of the election Court, the appellant shall apply on notice to a Judge in Chambers to have a day fixed for the hearing and to have the appeal set down, and on one week's default the respondent may move to dismiss the appeal.

Rule 71.

Election appeals.

ORDER DISPENSING WITH PRINTING OF RECORD OR FACTUM IN ELECTION APPEALS.

Rule 71.—In election appeals a Judge in Chambers may, upon the application of the appellant or respondent, make an order dispensing with the printing of the whole or any part of the record, and may also dispense with the delivery of any factum or points for argument in appeal.

HABEAS CORPUS.

Rule 72.—Applications for writs of *habeas corpus ad subjiciendum* shall be made by motion for an order which, if the Judge so direct, may be made absolute *ex parte* for the writ to issue in the first instance; or the Judge may direct a summons for the writ to issue, and the Judge in his discretion may refer the application to the Court. Such summons and order may be in the Forms D and E respectively set out in the Schedule to these Rules.

Rule 73.—If a summons for the writ to issue is granted, a copy thereof shall be served upon the Attorney-General of the province in which the warrant of commitment was issued, and shall be returnable within such time as the summons shall direct.

Rule 74.—On the argument of the summons for a writ to issue, the Judge may in his discretion, direct an order to be drawn up for the prisoner's discharge instead of waiting for the return of the writ, which order shall be a sufficient warrant to any gaoler or constable or other person for his discharge.

Rule 75.—The writ of *habeas corpus* shall be served personally, if possible, upon the party to whom it is directed; or if not possible, or if the writ be directed to a gaoler or other public official, by leaving it with a servant or agent of the person confining or restraining, at the place where the prisoner is confined or restrained, and if the writ be directed to more than one person, the original delivered to or left with such principal person, and copies served or left on each of the other persons in the same manner as the writ. Such writ of *habeas corpus* may be in the Form F set out in the Schedule to these Rules.

Rule 76.—If a writ of *habeas corpus* be disobeyed by the person to whom it is directed, application may be made to the Judge or the Court on an affidavit of service and disobedience,

for an attachment for contempt. The affidavit of service may be in the Form G. set out in the Schedule to these Rules. Rule 77.

Habeas corpus.

Rule 77.—The return to the writ of *habeas corpus* shall contain a copy of all the causes of the prisoner's detention endorsed on the writ, or on a separate schedule annexed to it.

Rule 78.—The return may be amended or another substituted for it by leave of the Court or Judge.

Rule 79.—When a return to the writ of *habeas corpus* is made, the return shall first be read, and motion then made for discharging or remanding the prisoner, or amending or quashing the return.

REFERENCES.

Rule 80.—Whenever a reference is made to the Court by the Governor-in-Council or by the Board of Railway Commissioners for Canada, the case shall only be inscribed by the Registrar upon the direction and order of the Court or a Judge thereof, and factums shall thereafter be filed by all parties to the reference in the manner and form and within the time required in appeals to the Court.

APPEALS FROM BOARD OF RAILWAY COMMISSIONERS.

Rule 81.—Whenever an appeal is taken from any decision of the Board of Railway Commissioners for Canada pursuant to the provisions of the Railway Act, the appeal shall be upon a case to be stated by the parties, or in the event of difference, to be settled by the said Board or the Chairman thereof, and the case shall set forth the decision objected to, and so much of the affidavits, evidence and documents as are necessary to raise the question for the decision of the Court.

2. All the Rules of the Supreme Court from 1 to 62, both inclusive, shall be applicable to appeals from the said Board of Railway Commissioners for Canada, except in so far as the Railway Act otherwise provides.

THE REGISTRAR'S JURISDICTION.

Rule 82.—The transaction of any business and the exercise of any authority and jurisdiction in respect of the same, which by virtue of any statute or custom, or by the practice of the Court, was, on the 23rd day of June, 1887, or might thereafter be done, transacted or exercised by a Judge of the Court sitting

Rule 82. Registrar's jurisdiction.

in Chambers, except the granting of writs of *habeas corpus* and adjudicating upon the return thereof, and the granting of writs of *certiorari*, may be transacted and exercised by the Registrar.

Rule 83.—In case any matter shall appear to the said Registrar to be proper for the decision of a Judge, the Registrar may refer the same to a Judge, and the Judge may either dispose of the matter, or refer the same back to the Registrar, with such directions as he may think fit.

Rule 84.—Every order or decision made or given by the said Registrar sitting in Chambers shall be as valid and binding on all parties concerned, as if the same had been made or given by a Judge sitting in Chambers.

Rule 85.—All orders made by the Registrar sitting in Chambers shall be signed by the Registrar.

Rule 86.—Any person affected by an order or decision of the Registrar, except as otherwise in these rules provided, may appeal therefrom to a Judge of the Supreme Court.

Rule 87.—All appeals from the Registrar to a Judge of the Court shall be by motion on notice setting forth the grounds of objection, and served within four days after the decision complained of, and two clear days before the day fixed for hearing the same, or served within such other time as may be allowed by a Judge of the said Court or the Registrar.

Rule 88.—Appeals from the Registrar to a Judge of the Court shall be brought on for hearing on the first Monday after the expiry of the delays provided for by the next preceding Rule, or so soon thereafter as the same can be heard, and shall be set down not later than the preceding Saturday in a book kept for that purpose in the Registrar's office.

Rule 89.—For the transaction of business under these Rules, the Registrar, unless absent from the city, or prevented by illness or other necessary cause, shall sit every juridical day, except during the vacations of the Court, at 11 a.m., or such other hour as he may specify from time to time by notice posted in his office.

FEES TO BE PAID REGISTRAR.

Rule 90.—The fees mentioned in Form H set out in the Schedule to these Rules shall be paid to the Registrar by stamps to be prepared for that purpose.

COSTS.

Rule 91. Costs.

Rule 91.—Costs in appeal between party and party shall be taxed pursuant to the tariff of fees contained in Form I set in the Schedule to these Rules.

Form I above referred to was amended by the general order of Oct. 8th, 1918, see Appendix "A." The effect of the amendment was to make very substantial increases in the fees allowed to solicitors in interlocutory applications. Form I as amended will be found set out in Appendix "B."

Rule 92.—The Court or a Judge may direct a fixed sum for costs to be paid in lieu of directing the payment of costs to be taxed.

Rule 93.—In any case in which by the order or direction of the Court, or Judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the Registrar may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and direct payment thereof, and the same may be recovered by the party entitled thereto, in the same manner as costs ordered to be paid may be recovered. This rule shall not apply to appeals from the Province of Quebec.

Rule 94.—The Registrar may, whenever he deems it advisable, reserve any question arising on the taxation of costs for the opinion of a Judge.

Rule 95.—The Registrar shall, for the purpose of any proceeding before him, have power and authority to administer oaths and examine witnesses, and shall in relation to the taxation of costs have authority to direct the production of such books, papers and documents as he shall deem necessary.

Rule 96.—Any person who may be dissatisfied with the allowance or disallowance by the Registrar, in any bill of costs taxed by him, or the whole or any part of any item, may, at any time before the certificate or allocatur is signed, or such earlier time as may in any case be fixed by the Registrar, deliver to the other party interested therein, and carry in before the Registrar, his objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the items

Rule 96.

Appeal from Registrar on costs.

or parts thereof objected to, and the grounds and reasons for such objections, and may thereupon apply to the Registrar to review the taxation in respect of the same. The Registrar may, if he shall think fit, issue, pending the consideration of such objections, a certificate of taxation or allocatur for or on account of the remainder of the bill of costs, and such further certificate or allocatur as may be necessary shall be issued by the Registrar after his decision upon such objections.

Rule 97.—Upon such application the Registrar shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof.

Rule 98.—Any party who may be dissatisfied with the certificate or allocatur of the Registrar as to any item which may have been objected to as aforesaid, may within two days from the date of the certificate or allocatur, or such other time as the Registrar at the time he signs his certificate or allocatur may allow, appeal to a Judge of the Supreme Court from the taxation as to the said item, and the Judge may thereupon make such order as to him may seem just; but the certificate or allocatur of the Registrar shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid.

Rule 99.—Such appeal shall be heard and determined by the Judge upon the evidence which shall have been brought in before the Registrar and no further evidence shall be received upon the hearing thereof, unless the Judge shall otherwise direct, and the costs of such appeal shall be in the discretion of the Judge.

CROSS-APPEALS.

p. 518.

Rule 100.—It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross-appeal, but if a respondent intends upon the hearing of an appeal to contend that the decision of the Court below should be varied, he shall, within fifteen days after the security has been approved, or such further time as may be prescribed by the Court or a Judge in Chambers, give notice of such intention to all parties who may be affected thereby. The omission to give such notice shall not in any way interfere with the power of the Court on the hearing of an apptal to treat the whole case as open; but may, in the discretion of the Court, be ground for an adjournment of the appeal, or for special order as to costs.

Crystal Ice v. Pierson & Burns.

Rule 100. Cross-appeals.

Two actions were brought by the respondents against the Crystal Ice Co., William Egbert and others. The plaintiffs in their claim alleged that a false and misleading prospectus was issued by the defendant company, of which the other defendants were directors; that they had subscribed for shares on the basis of the prospectus and made payments thereon, and asked for repayment of this sum and delivery up of their obligations. The trial Judge found in favour of the plaintiffs against the defendant company and dismissed the action against the directors. The company appealed to the Supreme Court of Alberta in banc, and the plaintiff cross-appealed against the directors; both the appeal and cross-appeal were dismissed. The Crystal Ice Co. then appealed to the Supreme Court, and the plaintiff cross-appealed against the directors. Both the appeal and cross-appeal were dismissed, although the Court was unanimous that the cross-appeal must fail, three members of the Court would dismiss the cross-appeal on the merits, while the other two were of opinion the appeal should be quashed.

(See Appendix C. 20.)

Lindmark v. Picard.

At the trial the plaintiff's action was dismissed, the Court of Appeal allowed the appeal of the plaintiff as regards the defendant Lindmark, but dismissed it as against the Revelstoke Saw Mill Co. and the Yale Lumber Co. The Court of Appeal judgment ordered that the action should be referred to the District Registrar at Vancouver to take accounts and make certain inquiries and further directions were reserved. When the appeal came on to be heard by the Supreme Court upon appeal by Lindmark, the respondent, Picard, cross-appealed as against the two companies; after reserving judgment the Court held that, following its then jurisprudence, the judgment against Lindmark was not a final judgment and thereupon quashed the appeal. It also held that the cross-appeal must fall along with the main appeal.

Rule 101.—The respondent who gives a notice of cross-appeal shall deposit a printed factum or points for argument in appeal with the Registrar in the manner hereinbefore provided as regards the principal appeal, and the parties upon whom such notice has been served shall also deposit their printed factum in the manner hereinbefore provided as regards the principal

Rule 102. Translation of factums.

appeal. Factums on the cross-appeal shall be interchanged between the parties as hereinbefore provided as to the principal appeal. The factum on the cross-appeal may be included in the factum on the main appeal.

TRANSLATION OF FACTUM.

Rule 102.—Any Judge may require that the factum or points for argument in appeal of any party shall be translated into the language with which such Judge is most familiar, and in that case the Judge shall direct the Registrar to cause the same to be translated and shall fix the number of copies of the translation to be printed, and the time within which the same shall be deposited with the Registrar, and the party depositing such factum shall thereupon cause the same forthwith to be printed at his own expense, and such party shall not be deemed to have deposited his factum until the required number of the printed copies of the translation shall have been deposited with the Registrar.

TRANSLATIONS OF JUDGMENTS AND OF OPINIONS OF JUDGES OF COURT BELOW.

Rule 103.—Any Judge may also require the Registrar to cause the judgments and opinions of the Judges in the Court below to be translated, and in that case the Judge shall fix the number of copies of the translation to be printed and the time within which they shall be deposited with the Registrar, and such translation shall thereupon be printed at the expense of the appellant.

PAYMENT OF MONEY INTO COURT.

Rule 104.—Money required to be paid into Court shall be paid into the Bank of Montreal at its Ottawa agency, or such other bank as shall be approved of by the Minister of Finance.

2. The person paying money into Court shall obtain from the Registrar a direcion to the bank to receive the money.

3. The bank receiving money to the credit of any cause or matter shall give a receipt therefor in duplicate; and one copy shall be delivered to the party making the deposit, and the other shall be posted or delivered the same day to the Registrar.

4. The stamps for the fees payable on money paid into Court shall be affixed to the receipt directed by this Rule to be posted or delivered to the Registrar.

PAYMENT OF MONEY OUT OF COURT.

Rule 105.

Payment of money out of Court.

Rule 105.—If money is to be paid out of Court, an order of the Court or a Judge in Chambers must be obtained for that purpose, upon notice to the opposite party.

HOW MADE.

Rule 106.—Money ordered to be paid out of Court is to be so paid upon the cheque of the Registrar, countersigned by a Judge.

FORMAL OBJECTIONS.

Rule 107.—No proceeding in the said Court shall be defeated by any formal objection.

EXTENDING OR ABRIDGING TIME.

Rule 108.—In any appeal or other proceeding the Court or a Judge in Chambers may by order, enlarge or abridge the time for doing any act, or taking any proceeding upon such (if any) terms as the justice of the case may require, and such order may be granted, although the application for the same is not made until after the expiration of the time appointed or allowed.

NON-COMPLIANCE WITH RULES.

Rule 109.—The Court or a Judge may, under special circumstances, excuse a party from complying with any of the provisions of the Rules.

REGISTRAR TO KEEP NECESSARY BOOKS.

Rule 110.—The Registrar is to keep in his office all appropriate books for recording the proceedings in all suits and matters in the said Supreme Court.

ADJOURNMENT IF NO QUORUM.

Rule 111.—If it happens at any time that the number of Judges necessary to constitute a quorum for the transaction of the business to be brought before the Court is not present, the Judge or Judges then present may adjourn the sittings of the Court to the next or some other day, and so on from day to day until a quorum shall be present.

Rule 112.
Time.

COMPUTATION OF TIME.

Rule 112.—In all cases in which any particular number of days not expressed to be clear days is prescribed by the foregoing Rules, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless such last day shall happen to fall on a Sunday, or a day appointed by the Governor-General for a public fast or thanksgiving, or any other legal holiday or non-juridical day, as provided by the statutes of the Dominion of Canada.

OTHER NON-JURIDICAL DAYS.

Rule 113.—Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sundays and others days on which the offices are closed, shall not be reckoned in the computation of such limited time.

Rule 114.—Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken, if done or taken on the day on which the offices shall next be open.

Rule 115.—Services of notices, summonses, orders and other proceedings, shall be effected before the hour of six in the afternoon, except on Saturday, when it shall be effected before the hour of two in the afternoon. Service effected after six in the afternoon on any week-day except Saturday shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day. Service effected after two in the afternoon on Saturday shall for the like purpose be deemed to have been effected on the following Monday.

SITTINGS AND VACATIONS.

Rule 116.—The office of the Supreme Court shall be open between the hours of ten o'clock in the forenoon and four o'clock in the afternoon (except on Saturdays, when it shall close at one o'clock), every day in the year except statutory holidays, and Long Vacation and Christmas Vacation.

2. During Vacation the office shall be open between the hours of ten o'clock in the forenoon and one o'clock in the afternoon.

CHRISTMAS VACATION.

Rule 117.

Christmas vacation.

Rule 117.—There shall be a vacation at Christmas commencing on the 15th of December and ending on the 10th of January.

LONG VACATION.

Rule 118.—The Long Vacation shall comprise the months of July and August.

VACATION IN COMPUTATION OF TIME.

Rule 119.—The time of the Long Vacation or the Christmas Vacation shall not be reckoned in the computation of the times appointed or allowed by these Rules for the doing of any act.

WRITS.

Rule 120.—A judgment or order for the payment of money against any party to an appeal other than the Crown, may be enforced by writs of *fieri facias* against goods, and *fieri facias* against land.

Rule 121.—A judgment or order requiring any person to do any act other than the payment of money or to abstain from doing anything may be enforced by writ of attachment, or by committal.

Rule 122.—Writs of *fieri facias* against goods and lands shall be executed according to the exigency thereof, and may be in the Form J set out in the Schedule to these Rules.

Rule 123.—Upon the return of the sheriff or other officer, as the case may be, of "lands or goods on hand for want of buyers," a writ of *venditioni exponas* may issue to compel the sale of the property seized. Such writ may be in the Form K set out in the Schedule to these Rules.

Rule 124.—In the mode of selling lands and goods and of advertising the same for sale, the sheriff or other officer is, except in so far as the exigency of the writ otherwise requires, or as is otherwise provided by these Rules, to follow the laws of his province applicable to the execution of similar writs issuing from the highest Court or Courts of original jurisdiction therein.

Rule 125.—A writ of attachment shall be executed according to the exigency thereof.

Rule 126. Writs.

Rule 126.—No writ of attachment shall be issued without the order of the Court or a Judge. It may be in the Form L set out in the Schedule to these Rules.

Rule 127.—In these Rules the term "writ of execution" shall include writs of *fieri facias* against goods and against lands, attachment and all subsequent writs that may issue for giving effect thereto. And the term "issuing execution against any party," shall mean the issuing of any such process against his person or property as shall be applicable to the case.

Rule 128.—All writs shall be prepared in the office of the Attorney-General, or by the attorney or solicitor suing out the same, and the name and the address of the attorney or solicitor suing out the same, and if issued through an agent, the name and residence of the agent also, shall be endorsed on such writ, and every such writ shall before the issuing thereof be sealed at the office of the Registrar, and a *præcipe* therefor shall be left at the said office, and thereupon an entry of issuing such writ, together with the date of sealing and the name of the attorney or solicitor suing out the same, shall be made in a book to be kept in the Registrar's office for that purpose, and all writs shall be tested of the day, month and year when issued. A *præcipe* for a writ may be in the Form M set out in the Schedule to these Rules.

Rule 129.—No writ of execution shall be issued without the production to the officer by whom the same shall be issued of the judgment or order upon which the execution is to issue, or an office copy thereof showing the date of entry. And the officer shall be satisfied that the proper time has elapsed to entitle the judgment creditor to execution.

Rule 130.—In every case of execution the party entitled to execution may levy the interest, poundage fees and expenses of execution over and above the sum recovered.

Rule 131.—Every writ of execution for the recovery of money shall be endorsed with a direction to the sheriff, or other officer, to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment or order, stating the amount, and also to levy interest thereon if sought to be recovered, at the rate of five per cent. per annum, from the time when the judgment or order was entered up.

Rule 132.—A writ of execution, if unexecuted, shall remain in force for one year only, from its issue, unless renewed in the

manner hereinafter provided; but such writ may, at any time before its expiration, by leave of the Court or a Judge, be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked in the margin with a memorandum signed by the Registrar or Acting-Registrar of the Court, stating the date of the day, month and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his attorney, and having the like memorandum; and a writ of execution so renewed shall have effect, and be entitled to priority according to the time of the original delivery thereof. Rule 133. Writs.

Rule 133.—The production of a writ of execution, or of the notice renewing the same, purporting to be marked with the memorandum in the last preceding Rule mentioned, showing the same to have been renewed, shall be *prima facie* evidence of its having been so renewed.

Rule 134.—As between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment or making of the order.

Rule 135.—Where six years have elapsed since the judgment or order, or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the Court or Judge for leave to issue execution accordingly. And the Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect. And the Court or Judge may impose such terms as to costs or otherwise as shall seem just.

Rule 136.—Any party against whom judgment has been given, or an order made, may apply to the Court or a Judge for a stay of execution or other relief against such a judgment or order, and the Court or Judge may give such relief and upon such terms as may be just.

Rule 137.—Any writ may at any time be amended by order of the Court or Judge, upon such conditions and terms as to costs and otherwise as may be thought just, and any amendment of a writ may be declared by the order authorizing the smae to have relation back to the date of its issue, or to any other date or time.

Rule 138. Sheriffs.

Rule 138.—Sheriffs and coroners shall be entitled to the fees and poundage set out in Form N of the Schedule to these Rules.

Rule 139.—Every order of a Judge in Chambers may be enforced in the same manner as an order of the Court to the same effect, and it shall in no case be necessary to make a Judge's order a rule or order of the Court before enforcing the same.

Rule 140.—No execution can issue on a judgment or order against the Crown for the payment of money. Where, in any appeal, there may be a judgment or order against the Crown directing the payment of money for costs, or otherwise, the Registrar may, on the application of the party entitled to the money, certify to the Minister of Finance, the tenor and purport of the judgment or order, and such certificate shall be by the Registrar sent to or left at the office of the Minister of Finance.

ACTING REGISTRAR.

Rule 141.—In the absence of the Registrar through illness or otherwise, the Chief Justice or acting Chief Justice may appoint an acting Registrar to perform the duties of the Registrar, and all powers and authorities vested in the Registrar may be exercised by the acting Registrar.

INTERPRETATION.

Rule 142.—In the preceding Rules, unless the context otherwise requires, "Judge" or "Judge of the Court" means any Judge of the Supreme Court, and the expression "Judge of the Supreme Court in Chambers" or "Judge in Chambers" shall also include the Registrar sitting in Chambers under the powers conferred upon him by Rules 82 to 89 inclusive.

Rule 143.—In the preceding Rules the following words have the several meanings hereby assigned to them over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction, that is to say:—

(1) Words importing the singular number include the plural number, and words importing the plural number include the singular number.

(2) Words importing the masculine gender include females.

(3) The word "party" or "parties" includes a body politic or corporate, and also His Majesty the King, and His Majesty's Attorney-General. Exchequer Court appeals.

(4) The word "affidavit" includes affirmation.

(5) The words "the Act" mean "The Supreme Court Act."

(6) The word "month" means calendar month where lunar months are not expressly mentioned.

EXCHEQUER COURT APPEALS.

Burnett v. The Hutchins Car Roofing Company and Robert E. Frame, 54 Can. S. C. R. 610. p. 749.

An appeal lies to the Supreme Court of Canada from the judgment of the Exchequer Court overruling an objection to its jurisdiction.

Per Anglin, J.—In exercising the jurisdiction conferred by section 23 (a) of the "Exchequer Court Act" the Court does not act as the substitute for the arbitrators who are given the same jurisdiction by section 20 of the "Patent Act," but acts in discharge of its ordinary curial functions and its judgment is appealable to the Supreme Court of Canada.

The appeal to the Supreme Court of Canada provided for by section 82 of the Exchequer Court Act is not confined to cases where the action is brought to recover a sum of money, but extends to those seeking to establish a claim to property or rights.

ELECTION APPEALS.

Louis Plourde v. Gauvreau, 47 Can. S. C. R. 211. p. 163.

Several of the preliminary objections to a petition against the election of a member of the House of Commons of Canada having remained undisposed of, on the day before the expiration of the six months limited for the commencement of the trial by section 39 of the Dominion Controverted Elections Act, R. S. C. 1906, c. 7, the petitioner applied to a Judge, by motions, (*a*) to obtain an enlargement of the time for the commencement of the trial, and, (*b*) to have a day fixed for the hearing on such preliminary objections. On appeal from the judgment dismissing the motions,

Held, that the judgment in question was not appealable to the Supreme Court of Canada under the provisions of section 64 of the Dominion Controverted Elections Act: *L'Assomption Election Case*, 14 Can. S. C. R. 429; *King's County Election Case*, 8 Can. S. C. R. 192; *Gloucester Election Case*, 8 Can.

Election appeals.

S. C. R. 204, and *Halifax Election Case*, 39 Can. S. C. R. 401, referred to.

Election cases—No appeal from a judgment in a provincial election case.

Charles William Cross v. William Frederick Wallace Carstairs, 47 Can. S. C. R. 559.

Held, per Davies, Idington and Anglin, JJ., that under the provisions of the Alberta Controverted Elections Act, the judgment of the Supreme Court of the province in proceedings to set aside an election to the legislature is final and no appeal lies therefrom to the Supreme Court of Canada.

Held, per Davies, Anglin and Brodeur, JJ., that the judgment of the Supreme Court of Alberta on appeal from the decision of a Judge on preliminary objections filed under the Controverted Elections Act is not a "final judgment" from which an appeal lies to the Supreme Court of Canada.

Held, per Duff, J., that a proceeding under said Act to question the validity of an election is not a "judicial proceeding" within the contemplation of section 2 (*e*) of the Supreme Court Act in respect of which an appeal lies to the Supreme Court of Canada.

Preliminary objections.

Paradis v. Cardin, 48 Can. S. C. R. 625.

Under the provisions of the Dominion Controverted Elections Act, 1874, the Judges of the Superior Court for the Province of Quebec made general rules and orders for the regulation of the practice and procedure with respect to election petitions whereby the returning officer was required to publish notice of such petitions once in the Quebec Official Gazette and twice in English and French newspapers published or circulating in the electoral division affected by the controversy. By section 16 of chapter 7, R. S. C. 1906, provision is made for the publishing of a similar notice by the returning officer once in a newspaper published in the electoral district.

Held, that the rule of practice is inconsistent with the provision as to the notice required by section 16, chapter 7, R. S. C. 1906, and consequently, has ceased to be in force.

Per Duff and Brodeur, JJ.—Even if such rule were still in force, failure on the part of the returning officer to comply with it would not be sufficient ground for the dismissal of the election petition.

Per Davies, Duff and Anglin, JJ.—Under the provisions of the Dominion Controverted Elections Act, R. S. C. 1906, c. 7, ss. 19 and 20, preliminary objections are required to be decided in a summary manner; consequently, a decision by an election Court Judge on any of the preliminary objections disposes of all the issues raised in that stage of the proceedings. Where an election petition is disposed of by the Judge upon one of several objections, without consideration of the others, the Supreme Court of Canada has jurisdiction to hear and determine questions arising upon all the preliminary objections in issue before the Election Court Judge; its jurisdiction is not confined to the objection upon which the judgment appealed from was solely based. Idington, J., contra. Fitzpatrick, C.J. and Brodeur, J., expressing no opinion. Railway appeals.

RAILWAY APPEALS.

Question of law to be stated by Board. p. 790.

The Canadian Pacific Railway Company v. The City of Ottawa and Certain Residents of the City of Ottawa, 48 Can. S. C. R. 257.

An appeal, under the provisions of section 55, or section 56, sub-section 3, of the Railway Act, R. S. C. 1906, c. 37, should not be entertained by the Supreme Court of Canada until the Board of Railway Commissioners for Canada has stated the case in writing and submitted for the opinion of the Court some question which, in the opinion of the board, is a question of law. (*Cf. Regina Rates Case*, 44 Can. S. C. R. 328, where this case was followed by Anglin, J., and 45 Can. S. C. R. at pp. 323 to 328.)

WINDING-UP ACT.

Arnold v. Dominion Trust Co, 56 S. C. R. 433. p. 806.

In the course of the liquidation of the Dominion Trust Co. in British Columbia, certain monies reached the liquidator, who was the executor of one Arnold, a former manager of the company. The plaintiff was the widow, and obtained leave to bring an action against the insolvent to recover the money under the will of her husband. The liquidator claimed that the will did not have the effect claimed by the plaintiff. The action proceeded in the Courts of British Columbia, and the plaintiff moved before the Registrar to affirm the jurisdiction of the Supreme Court. The motion was granted, the Registrar holding that after leave had been granted under the Winding-up Act

Winding-up appeals.

all further proceedings were governed by the Judicature Act and rules of British Columbia, and that no further leave was necessary to bring the appeal to the Supreme Court; that section 106 of the appeal of the Winding-up Act did not apply, but the appeal would lie under the provisions of the Supreme Court Act (Appendix C. 21). When the appeal came to be heard on the merits before the Supreme Court and the respondent moved to quash for want of jurisdiction, a majority of the Supreme Court held that the Court had jurisdiction without any leave being required under section 106 of the Winding-up Act.

Laura Blanche Arnold v. The Dominion Trust Company, 56 Can. S. C. R. 433.

By section 7 of the Life Insurance Policies Act of British Columbia a man may "by any writing identifying the policy by its number or otherwise" cause a policy of insurance on his life to be deemed a trust for the benefit of his wife for her separate use.

Held, per Davies and Anglin, JJ., Fitzpatrick, C.J., *dubitante,* Idington, J., contra, that such declaration in writing may be made by will as the legislature of British Columbia, when enacting this provision, must be presumed to have adopted the judicial construction of similar legislation in the Province of Ontario.

A. by his will bequeathed to his wife "the first seventy-five thousand dollars collected on account of policies of life insurance."

Held, Davies, J., contra. that said devise was not a writing "identifying the policy by its number or otherwise" as required by section 7 of the Act. and said sum of $75,000 did not enure to the benefit of A.'s wife.

After the death of A. his wife brought action against the Trust Company, executor of his will, and said company's liquidator under a winding-up order to recover $75,000 out of the proceeds of life policies collected by the executor. On appeal from the judgment of the Court of Appeal in said action.

Held Idington and Brodeur, JJ., dissenting, that the case was not one subject to the provisions of section 106 of the Winding-up Act, and leave to appeal was not necessary.

Judgment of the Court of Appeal, 35 D. L. R. 145, sustaining that at the trial, 32 D. L. R. 301, affirmed.

Ross v. Ross, Barry & McRae, 53 Can. S. C. R. 128.

Winding-up appeals.

Per Fitzpatrick, C.J. and Idington and Brodeur, JJ. (Duff and Anglin, JJ., contra).—The appeal to the Supreme Court of Canada given by section 106 of the Winding-Up Act, R. S. C. 1906, c. 144, must be brought within sixty days from the date of the judgment appealed from, as provided by section 69 of the Supreme Court Act, R. S. C. 1906, s. 139. After the expiration of the sixty days so limited neither the Supreme Court of Canada nor a Judge thereof can grant leave to appeal. *Goodison Thresher Co.* v. *Township of McNab*, 42 Can. S. C. R. 694, and *Hillman* v. *Imperial Elevator and Lumber Co.*, 53 Can. S. C. R. 15, followed; *Grand Trunk Railway Co.* v. *Department of Agriculture of Ontario*, 42 Can. S. C. R. 557, distinguished.

Per Duff, J., dissenting.—Under section 106 of the Winding-Up Act, the application for leave to appeal may be made after the expiration of sixty days from the date of the judgment from which the appeal is sought and, whether it be made before or after the expiration of the sixty days, lapse of time should be considered by the Judge applied to and acted on by him, in the exercise of discretion, according to the circumstances of the case.

Per Anglin, J., dissenting.—On such an application for leave to appeal, the provisions of section 71 of the Supreme Court Act apply and an extension of the time for appealing may be obtained thereunder.

Per Idington, J.—There is no authority under which an application for an order affirming the jurisdiction of the Supreme Court of Canada to entertain an appeal can be made to the Court; the proper and only course is by application to the Registrar acting as Judge in Chambers. *Per* Duff, J.—Although not strictly the proper procedure, the objection to such an application may be waived.

Per Duff, J.—Section 106 of the Winding-Up Act imposes a further condition of the right of appeal over and above those imposed by sections 69 and 71 of the Supreme Court Act; an applicant, having obtained leave after the expiration of the time limited for appealing, is still obliged to satisfy a Judge of the Court appealed from that special circumstances justify an extension of time, and it is the duty of that Judge to exercise proper discretion in making such an order on his own responsibility: *Attorney-General* v. *Emerson*, 24 Q. B. D. 56, and *Banner* v. *Johnston*, L. R. 5 H. L. 157, referred to.

Per Brodeur, J.—In the case of appeals from judgments rendered under the Winding-Up Act, the jurisdiction of the

Criminal appeals.

Supreme Court of Canada is determined by section 106 of the Winding-Up Act, and is dependent solely upon the amount involved in the judgment appealed from and not upon the amount demanded in the proceedings on which that judgment was rendered.

CRIMINAL APPEALS.

p. 813.

Mulvihill v. His Majesty The King, 49 Can. S. C. R. 587.

Where, on an application under section 901 of the Criminal Code, the Court, in the exercise of judicial discretion, has refused to allow a postponement of the trial of the person indicted, there can be no review of the decision by an Appellate Court and the question presented does not constitute a question of law upon which there may be a reserved case under the provisions of section 1014 of the Criminal Code. Judgment appealed from (5 W. W. R. 1229; 26 West. L. R. 955), affirmed: *The Queen* v. *Charlesworth*, 1 B. & S. 460; *Winsor* v. *The Queen*, L. R. 1 Q. B. 390; *Rex* v. *Lewis*, 78 L. J. K. B. 722; *Rex* v. *Blyth*, 19 Ont. L. R. 386; *Reg.* v. *Johnson*, 2 C. & K. 354, and *Reg.* v. *Slavin*, 17 U. C. C. P. 205, referred to.

Appendix H Criminal Code 1019—New Trial.

Eberts v. His Majesty The King, 47 Can. S. C. R. 1.

On a trial for the murder of a police officer there was evidence that E. and J. had set out from their home, during the night when the deceased was killed, with the intention of committing theft; J. and his wife testified that, on returning home, E. had told them that a man, whom he supposed to be a secret-police constable, had pointed a pistol at him and told him to "go to hell" and that he had shot him. The defence was rested entirely upon *alibi*, and the accused testified on his own behalf stating that he had been at home during the whole of the night in question, but making no mention of any facts concerning the shooting. In his charge the trial Judge reviewed the evidence, in a general way, and told the jury that, upon the evidence adduced, they must either convict or acquit of the crime of murder, that they could not return a verdict of manslaughter, that if they believed J.'s account of what happened to be substantially true they should convict of murder; and he did not instruct the jury as to what, in law, constituted manslaughter nor as to circumstances on which the verdict might be reduced to manslaughter. E. was convicted of murder.

Held, Duff, J., dissenting, that, on the evidence, the charge of the trial Judge was right, and that the omission to instruct the jury in respect to manslaughter did not occasion any substantial wrong or miscarriage which could justify the setting aside of the conviction nor a direction for a new trial. Criminal appeals.

Per Fitzpatrick C.J., and Idington, J.—In a criminal appeal, it is doubtful whether any question except that upon which there was a dissent in the Court below could be reviewed on an appeal to the Supreme Court of Canada.

Per Duff, J., dissenting.—In the circumstances of the case, the effect of the charge was to withdraw from the jury some evidence which ought to have been considered by them and which, if considered by them, might have influenced them favorably towards the accused in arriving at their verdict; consequently, some substantial wrong was thereby occasioned on the trial, and the conviction should not be permitted to stand.

New trial.

p. 816.

Kelly v. His Majesty The King, 54 Can. S. C. R. 220.

On an indictment containing several counts, including charges for theft, receiving stolen property and obtaining money under false pretences, in respect of which the person accused had been extradited from the United States of America, evidence was admitted on behalf of the Crown, for the purpose of shewing *mens rea*, which involved participation of the accused in an alleged conspiracy. The principal objections urged against a conviction upon the charges mentioned were (*a*) that by the manner in which the trial had been conducted the jury may have been given the impression that the accused was on trial for conspiracy, a non-extraditable offence; (*b*) that misstatements and inflammatory observations had been made by counsel for the Crown in addressing the jury; and (*c*) that, in his charge, the trial Judge had failed to correct impressions which may have been thus made on the minds of the jury or to instruct them that portions of the evidence admitted in regard to other counts ought not to be considered by them in disposing of the charge of obtaining money under false pretences.

Held, that, as there was sufficient evidence to support the verdict of the jury on the charge of obtaining money under false pretences, quite apart from the irregularities alleged to have taken place at the trial, no substantial wrong or miscarriage had been occasioned and there could be no ground for setting

Criminal appeals.

aside the conviction or directing a new trial under the provisions of section 1019 of the Criminal Code.

Judgment appealed from (11 West. W. R. 46), affirmed.

Procedure at trial.

Shajee Ram v. His Majesty The King, 51 Can. S. C. R. 398.

After examination on *voire dire*, in a judicial proceeding, a person called as a witness (with the assistance of an interpreter) went through a ceremony accepted as the taking of an oath in the form usual with his race and class, knowing and intending that his testimony should be received and acted upon as evidence given under oath.

Held, that on prosecution for perjury in giving his testimony the witness could not set up the defence that he had not been duly sworn: *Rex* v. *Lai Ping*, 11 B. C. Rep. 102; *The Queen's Case*, 2 Brod. & Bing. 284; *Omychund* v. *Barker*, 1 Atk. 21; *Attorney-General* v. *Bradlaugh*, 14 Q. B. D. 667, and *Curry* v. *The King*, 48 Can. S. C. R. 532, referred to.

Judgment appealed from (19 D. L. R. 313; 30 West. L. R. 65), affirmed.

APPENDIX A.

General Order, October 8, 1918.

p. 614.

It is hereby ordered, pursuant to the powers conferred by section one hundred and nine of the Supreme Court Act, that the tariff of fees between party and party (Form I.) be amended as follows:—

1. By striking out the last item thereof and substituting therefor the following:

Allowance to the duly entered agent in any appeal...	$25 00
To be increased under special circumstances in the discretion of the Registrar to a sum not exceeding.	40 00

In cases where the solicitors on the Record reside in Ottawa they shall be entitled to one-half of this allowance.

2. By substituting for the figures $25.00 in the 7th item thereof:

"On motion to quash proceedings, etc. . ." the figures	50 00

3. By inserting after the said seventh item the following:

Upon *ex parte* motions before the Registrar in Chambers, including affidavits, etc.	10 00
To be increased in the discretion of the Registrar to a sum not exceeding	15 00
Upon contested motions before the Registrar in Chambers, including affidavits	15 00
Subject to be increased in the discretion of the Registrar in special cases to a sum not exceeding.....	40 00
Upon motions before a Judge in Chambers, including affidavits, etc.	20 00
Subject to be increased in the discretion of the Judge to a sum not exceeding	75 00

The above fees for motions to cover all preliminary proceedings, notices, certificates, correspondence, drafting orders and settling and issuing the same, but not to include disbursements.

Appendix A.

B. It is further ordered that Rule No. 12 be repealed and the following substituted therefor:—

RULE 12—

The case shall be in demy quarto form. It shall be printed on paper of good quality and on one side of the paper only with the printed pages to the left, and the type shall be pica (but long primer shall be used in printing accounts or tabular matter). The size of the case shall be eleven inches by eight and one-half inches, and every tenth line shall be numbered in the margin. The number of lines on each page shall be 47 or thereabouts and there shall be at least 500 words in every printed page. Where evidence is printed there shall be a head-line on each page, giving name of witness, and shewing whether the evidence is examination-in-chief, cross-examination, or as the case may be. All exhibits shall be grouped together and printed in chronological order. All pleadings, judgments and other documents shall be printed in full unless dispensed with by the Registrar. The title page shall contain the name of the Court and province from which the appeal comes, and the style of cause, putting the appellant's name first, as follows:—

A.B.
(Plaintiff or defendant, as the case may be.)
Appellant.

AND

C.D.
(Defendant or plaintiff, as the case may be.)
Respondent.

The names of solicitors and agents must also be added.

The price to be taxed for the printing of 25 copies in the form prescribed by these rules shall not exceed 50 cents for every 100 words for each printed page of pica or its equivalent.

There shall be an index at the beginning of the case, which shall set out in detail the entire contents of the case in four parts, as follows:—

Part I. Each pleading, rule, order, entry or other document with its date, in chronological order.

Part II. Each witness by name, stating whether for plaintiff or defendant, examination-in-chief or cross-examination, or as the case may be, giving the page.

Part III. Each exhibit with its description, date and number, in the order in which they were filed.

Part IV. All judgments in the Courts below, with the reasons for judgment, and the name of the Judge delivering the same. Appendix A.

2. If the appellant desires the case may be printed according to the regulations as to form and type in appeals to His Majesty in Council.

C. It is further ordered that Rule No. 54 be repealed and the following substituted therefor:—

RULE 54—

All interlocutory applications in appeal shall be made by motion, supported by affidavits to be filed in the office of the Registrar. The notice of motion shall be served at least four clear days before the time of hearing.

All affidavits and material to be used on a motion shall be filed with the Registrar at least two clear days before the motion is heard. The notice of motion shall set out fully the grounds upon which it is based. In all motions to quash for want of jurisdiction a copy of the pleadings and judgments in the Courts below shall form part of the material filed.

D. And it is further ordered that Rule No. 57 be repealed and the following substituted therefor:—

RULE 57—

Motions to be made before the Court are to be set down on a list paper and are to be called before the hearing of the appeals is proceeded with on the first day of each week on which the Court is in session.

Dated at Ottawa, the 8th day of October, A.D. 1918.

(Sgd.) C. FITZPATRICK, Chief Justice.
(Sgd.) L. H. DAVIES, J.
(Sgd.) L. P. DUFF, J.
(Sgd.) FRANK A. ANGLIN, J.
(Sgd.) L. P. BRODEUR, J.

Witness:
E. R. CAMERON.

APPENDIX B.

Form I.

Appendix B. (As amended by General Order of Oct. 8th, 1918.)

TARIFF OF FEES—PARTY AND PARTY.

p. 614. To be taxed between party and party in the Supreme Court of Canada:

On stated case required by section 73 of the Act when prepared and agreed upon by the parties to the cause, including attendance on the Judge to settle same, if necessary, to each party	$25 00
Notice of appeal	4 00
On consent to appeal directly to the Supreme Court from the Court of original jurisdiction	3 00
Notice of giving security	2 00
Attendance on giving security	3 00
On motion to quash proceedings under section 50 according to the discretion of the Registrar to....	50 00
Upon *ex parte* motions before the Registrar in Chambers, including affidavits, etc.	10 00
To be increased in the discretion of the Registrar to a sum not exceeding	15 00
Upon contested motions before the Registrar in Chambers, including affidavits, etc.	15 00
Subject to be increased in the discretion of the Registrar in special cases to a sum not exceeding	40 00
Upon motions before a Judge in Chambers, including affidavits, etc.	20 00
Subject to be increased in the discretion of the Judge to a sum not exceeding	75 00
The above fees for motions to cover all preliminary proceedings, notices, certificates, correspondence, drafting orders and settling and issuing the same, but not to include disbursements.	
On factums in the discretion of the Registrar to	50 00
Subject to be increased by order of the Court or a Judge in Chambers.	

For engrossing for printer copy of case as settled, when such engrossed copy is necessarily and properly required, per folio of 100 words.....	$0 10
For correcting and superintending printing, per 100 words	05
On dismissal of appeal if case be not proceeded with, in the discretion of the Registrar to	25 00
Subject to be increased by order of the Court or a Judge in Chambers.	
Suggestions under sections 83, 84 and 85, including copy and service	2 50
Notice of intention to continue proceedings under section 87	4 00
On depositing money under section 66 of the Dominion Controverted Elections Act	2 50
Notice of appeal in election cases limiting the appeal to special and defined questions under section 67 of the Dominion Controverted Elections Act....	6 00
Allowance to cover all fees to attorney and counsel for the hearing of the appeal, in the discretion of the Registrar to	200 00
Subject to the increased by order of the Court or a Judge in Chambers.	
On printing factums, the same fee as in printing the case. Besides the Registrar's fees, reasonable charges for postages and disbursements necessarily incurred in proceedings in appeal will be taxed by the taxing officer.	
Allowance to duly entered agent in any appeal	25 00
To be increased under special circumstances in the discretion of the Registrar to a sum not exceeding..	40 00
In cases where the solicitors on the record reside in Ottawa, they shall be entitled to one-half of this allowance.	

APPENDIX C.

Appendix C.1

Unreported Practice Decisions of the Court and Registrar.

Registrar's Judgment.

Windsor Security Co. v. Applebe, Feb. 28, 1918; March 6, 1918.

This is a motion to affirm jurisdiction, Raney, K.C., for motion; W. L. Scott, contra.

The facts shortly are that the plaintiff, Applebe, is the holder of a mortgage made by the defendant, which was admittedly in default, and brought an action for foreclosure. The defendant moved to have the action dismissed on the ground that leave was necessary under the Ontario Mortgagor & Purchasers' Relief Act, which provides that under certain circumstances an action on a mortgage should not be brought, except by leave of a Judge. Mr. Justice Sutherland, before whom the motion was made, granted the order, but on appeal to the Appellate Division, the order was set aside so that the action can now proceed to trial in the ordinary way.

I am of the opinion that the motion to dismiss and order made thereon were purely interlocutory. There is no final disposition of the matters in controversy by the judgment appealed against. The case is quite distinguishable from *Stokes Stephens Oil Co.* v. *McNaught,* now standing for judgment. In that case the effect of the stay granted was to finally dispose of the rights of the parties in the matter in controversy; such is not the case here. In the present case the defendant is not precluded from setting up in his statement of defence that the action is prematurely brought, and this ground of defence would be open to him in this Court if, after the case is finally disposed of on the merits in the Courts below, it comes by way of appeal before the Supreme Court.

A motion by way of appeal from the Registrar's judgment was not proceeded with.

APPENDIX C. 2.

Stokes-Stevens Oil Co. v. McNaught, October 23rd, 1917.

The Registrar: This is a motion to affirm the jurisdiction of the Court. The facts of the case are set out in the judgment of Chief Justice Harvey. It appears that the appellants and

respondent entered into an agreement on the 25th Feb., 1915, Appendix C.2
for the drilling of a well for the discovery of oil or gas. The agreement contained a provision for arbitration if disputes should arise between the parties. The respondent proceeded under the contract, and an accident having occurred, the parties disagreed as to their respective obligations under the agreement. In May following the respondent appointed an arbitrator and called upon the appellants to do the same under the terms of the arbitration clause. On the 30th May the appellants instituted an action to restrain the respondent and the arbitrator from proceeding with the arbitration. An interim injunction was obtained, but a motion to continue the injunction to the trial was dismissed on the 9th of June. On the 15th June the respondent notified the appellants of the appointment of a new arbitrator, and on the same day the appellants notified the respondent of the appointment of their arbitrator coupled with a notice that the appointment was without prejudice to the appellants' right to dispute the validity of any award that might be made. A third arbitrator was subsequently named, and a unanimous award made on the 4th July. No steps were taken either to set aside the award or to have it made a rule of Court, but on the 26th Feb., 1917, the present action was instituted, whereby appellants claimed that the respondent had broken his contract, and asked for the return of moneys paid on account as well as payment over of certain moneys in the bank. Thereupon the respondent applied to the Court to have all proceedings stayed in the action, relying upon the provisions of section 5 of the Arbitration Act, Statutes, 1909, chap. 6, Alberta, which reads as follows:—

"If any party to a submission or any person claiming through or under him commence any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings and the Court, or a Judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Appendix C.2

The Judge before whom the motion was made was of the opinion that the action for breach of contract did not come within the terms of the submission to arbitration and refused the stay. An appeal was then taken to the Supreme Court of Alberta, which was allowed, and a judgment pronounced staying all proceedings. It is from this judgment that the present appeal is taken.

Mr. Scott for the motion contends that this is a final judgment, and the Court has jurisdiction. Mr. Smellie, contra, urges that the judgment is a discretionary one from which there is no appeal by reason of section 45 of the Supreme Court Act, and also that the order is not final. In support of the first he cites the case of *Maritime Bank* v. *Stewart*, 20 S. C. R. 105. I do not see that this case has any application. There, while proceedings in bankruptcy were pending in England in which the plaintiff had filed his claim with the assignee in bankruptcy, he also brought an action in the High Court of Justice in Ontario for the same claim. This Court held that a judgment in Ontario affirmed by the Court of Appeal staying the proceedings in the Ontario Courts was not a final judgment within the meaning of the Supreme Court Act.

In that case it is apparent that the judgment in the Ontario Court did not finally determine anything with regard to the rights of the parties. It simply stayed proceedings in one court while the same issue was being tried out in another. In the present case the judgment of the Supreme Court of Alberta determined finally that the clause of the Arbitration Act in dispute does apply to this submission to arbitration, and that the rights of the parties have been determined by the award of the arbitrators.

The appellants, dissatisfied with this judgment, claim that under a proper construction of the submission and the Arbitration Act, the matter in dispute between the parties was not the subject of compulsory arbitration provided for in the agreement.

I am of the opinion that the interpretation given to the words "final judgment" in the amendment of the Supreme Court Act (1913), applies to this judgment, and that we have here a final judgment of the highest Court of last resort in the Province of Alberta in an action instituted in a Superior Court, and that there is jurisdiction under section 36 of the Supreme Court Act.

The Court dismissed with costs an appeal from the order of the Registrar.

November 13, 1917.

APPENDIX C. 3.

Wigle v. The Corporation of Gosfield, May 28, 1913.

Davies, J.—I entertain grave doubts whether we have jurisdiction to hear this appeal at all.

The matters in dispute were by consent referred to the Drainage Referee "to be tried pursuant to the provisions of the Municipal Drainage Act," and the reference provided that "all proceedings herein may be had and taken as if the action had originally been brought under and by virtue of the said Act."

This consent reference under the Municipal Drainage Act must be held to embody and be governed by all the provisions of that Act, including the one making the judgment of the Court of Appeal for Ontario on any appeal to that Court "conclusive and binding upon all parties." It is true that provincial legislation cannot take away any rights of appeal which parties otherwise would possess to this Court. But all such parties may, if they please, waive their right of appeal and consent to the finality of a judgment of any provincial Court; and I am in doubt whether that has not been done in this case.

Apart, however, from these doubts, I am of opinion that the judgment appealed from is right. One of the substantial objections taken to that judgment was the striking out from the Referee's award of certain damages allowed by him for alleged depreciation in the value of the plaintiff's lands which were flooded, *arising out of the apprehension of future damage to those lands.* Mr. Wilson, for the appellant, contended that the test whether such damages were recoverable or not in an action such as this one was the legality or otherwise of the Act complained of.

The acts complained of in this case as causing the damages complained of were really a combination of several things, namely, the reconstruction and narrowing of the water passage way of the bridge over the river below plaintiff's lands, combined with the filling up of a channel which the river had itself cut into the lake through lands belonging to the defendants, between plaintiff's lands and the bridge.

The illegality complained of was not in the filling up of the "cut" to the lake, nor in the construction of the bridge itself; but in the absence of proof that a by-law had been passed authorizing its construction. The absence of such a by-law did not make the construction of the bridge an "unlawful act"

Appendix C.3

within the meaning of those words as creating a cause of action in the plaintiff. An unlawful act constituting a cause of action is such an act as a trespass upon plaintiff's land or other premises. Here the building of the bridge and the filling up of the cut were neither of them singly, nor were they combined, in themselves, a trespass upon or infringement of plaintiff's rights for which he could sue and recover damages. Nor can I see how non-compliance with the statutory requirements as to a by-law being passed before or after the building of the bridge could affect such right or cause of action. This arose only as and when his lands were damaged by the overflow caused by the filling up of the cut, and the alleged construction of the water passage of the bridge too narrowly. Whatever doubts once existed as to the damages recoverable where there is a wrongful interference with the enjoyment of a man's property must now be taken to have been set at rest by the modern cases of *Mitchell* v. *Darley Main Colliery Co.*, 14 Q. B. D. 125, decided by the Court of Appeal, and *West Leigh Colliery Co.* v. *Tunnicliffe & Hampson*, 1908, A. C. 27, decided by the House of Lords.

These are the cases which upon the application of the principles they determine the judgment appealed from is largely founded. I concur with that judgment, and would dismiss the appeal and the cross-appeal with costs.

Idington, J.—Our jurisdiction to hear this appeal has been challenged. Some of the numerous legal questions raised thereby on the merits are novel and difficult. The appellant is a farmer, and the respondent a municipal corporation. The appellant brought an action for damages done his lands and crops thereon by reason of the overflowing thereof from the waters of Cedar Creek in said township of Gosfield.

His statement of claim alleges that the respondent had constructed a bridge 160 feet long on one of its public roads across said creek, and later before the year 1897, replaced that by a bridge 60 feet long, with approaches which were higher than the adjoining lands, and that in consequence thereof the waters of the creek were so dammed back as to overflow and damage the lands of appellant.

The creek, it is alleged, by his statement of claim in 1897, broke through its bank and flowed into Lake Erie, and thenceforward there was no more overflowing of appellant's lands until in 1907, when the respondent reconstructed its highway

at the point thereon across which this new outlet of the stream had found its way. Appendix C.3

It is then alleged that this left but one outlet of a less capacity than had existed prior to 1897, and insufficient to accommodate the waters coming down the creek as was well known to respondent.

Then by paragraph 13 it is alleged as follows:—

"13. As a direct consequence of defendant's wrongful act in closing said outlet and damming back and obstructing the flow of the waters of said creek, the plaintiff's lands have been, since Dec., 1907, at times of ordinary freshet, continuously flooded by the waters of said creek."

Such is the appellant's cause of action as it stood when transferred or disposed of by consent in manner I am about to refer to.

The respondent's statement of defence besides denying the statement of claim alleges that the bridge had been reconstructed in 1892, and properly shortened, and again in 1897 by a better structure than lastly named, containing no such obstructive timbers as therein, and with one open span sufficient to carry all the water coming down the stream upon all ordinary occasions, but that it was impossible to provide against extraordinary floods, such as caused the alleged damages in question.

Up to this point we have nothing but an ordinary common law action or rather an extraordinary one founded upon principles of the common law and of its ordinary application, and answered accordingly.

But the statement of defence proceeded further to allege a variety of causes for the trouble, and amongst others that the township of Colchester, up the stream, had had drainage works constructed under the Municipal Drainage Act, and other drains leading into said creek whereby a greatly increased flow of water and more rapid movement thereof had resulted in bringing upon the appellant's land more than usual water and thus caused his damage, if any, complained of.

It was as a result thereof submitted by the statement of defence that if any damage had resulted it was in part by reason of the construction of the drainage works aforesaid, and hence the Court had no jurisdiction to try the issue in the action.

The parties at the sitting of the Court where I assume the case had been set down for trial, consented to an order being made by the Chancellor, dated 18th May, 1910, wherein it was

Appendix C.3

recited that the action involved the question of drainage, and was directed as follows:—

"This Court doth order and adjudge that the matters in dispute between the parties be transferred for trial by a referee appointed under the provisions of the Municipal Drainage Act, to be tried pursuant to the provisions of the said Act, and all proceedings herein may be had and taken as if the action had originally been brought under and by virtue of the said Act."

The Drainage Referee took up the matter and made a report, wherein he awarded damages for permanent injury to the appellant's property, affecting the selling value thereof, and estimated by him at $2,000, and also a large sum for direct damages to the crops or the rendering of cropping impossible.

The Court of Appeal set aside the award of $2,000, and reduced the other damages to $1,320.

Is such a case appealable here?

Counsel for appellant relies upon a number of authorities shewing that this Court had entertained appeals from the Court of Appeal wherein proceedings had been had by way of action and reference to the Drainage Referee. It so happens that there has not been such an appeal to this Court entertained by it as appealable since the Supreme Court Act was amended in its definition of what cases from Ontario are appealable. One unreported case: *Harwich* v. *Raleigh*, noted in Cameron's Practice, as decided in May, 1895, seems clearly to decide that the result of reference or proceedings under the Municipal Drainage Act are final, or become so at the Court of Appeal, and cannot be brought here.

No doubt this is in accord with the general jurisprudence of this Court; not to entertain an appeal where the matter has been instituted in any Court or before any tribunal not strictly within the terms of the Supreme Court Act, section 36, a Superior Court of jurisdiction.

The case of *Tucker* v. *Young*, 30 Can. S. C. R. 185, is a very strong instance of this. There the transfer had taken place from a County Court to a Superior Court because the former had no jurisdiction.

This case at first sight seems as it were the converse thereof, but I rather think it is in substance within it. A proceeding which was taken here in the Superior Court, but the action was not referred to the referee. The only thing therein so referred was the question of costs. In *Ellice* v. *Hiles*, 23 Can. S. C. R. 429, relied upon, the action was referred, and the other cases

relied upon do not now help since the validity or invalidity of by-laws no longer forms ground of appeal unless by leave of the Court of Appeal or this Court. Appendix C.3

It is quite clear that anything for which a party has as of right to resort to the Drainage Referee's Court for relief is not appealable here.

It is a special jurisdiction created for executing or administering justice in a class of cases for which by the law of the province, no right of action will lie in a Superior Court.

It so happens that by the legislation creating it other things for which an action will lie may be so involved in such proceedings as to be drawn to that Court by force of the legislation, and thus incidentally as it were the right of action is taken away.

It is not competent for the legislature to attempt directly to limit the jurisdiction of this Court, yet is it competent for the legislature to take away any right of action in a Superior Court and thus affect the jurisdiction of this Court which is founded only upon actions in a Superior Court

I incline to think that is what happened here.

It is quite clear, for example, that the legislature can take away the right of action that might arise against a municipality for anything done in the course of discharging the duties its power gives it, and say that the claims so arising shall be disposed of by means of arbitration and not by action.

That is exactly what has arisen in this case as to the main branch of the appeal.

The municipal council of the respondent were in building the bridge here in question, doing that which is lawful. Indeed they were doing that which their clear duty required they should do. The respondent might have been indicted had the bridge not been built.

The case presents the exact point decided in the case of *Pratt* v. *Stratford*, 16 O. A. R. p. 5. The council may not be compellable to build a bridge where none had existed, or might divert the highway and escape the duty, and fall within the law as laid down in *Regina* v. *Haldimand*, 38 U. C. R. p. 396. If then there was such permanent injury to the appellant's property as he claims, that was a subject fit for an arbitration proceeding under section 437 of the Municipal Act. The tribunal there and in the other sections of that Act provided for such cases could have been invoked and no other could pass thereupon. See the case of *Raleigh* v. *Williams* (1893), A. C. 540, at p. 550. If the respondent had so pleaded there is not a

Appendix C.3

shadow of doubt but that the jurisdiction of the Court in respect thereof was ousted. And I do not see that this omission to plead it herein can enable appellant to come here.

The case of *Pratt* v. *Stratford* turned upon the absence of a by-law, and though there were none the Chancellor and the Court of Appeal held there could be no action.

It was the duty to repair that the council had acted upon without a by-law. There was a special statute in question there, relative to the duty, but that was only incidental to the raising of the money and did not affect the principles of law applicable. That case was not cited to the Court of Appeal, and hence undue importance is attached to the absence or want of a by-law.

The point involved touches both the question of jurisdiction herein and the merits of the appeal in ways so obvious as not to need elaboration.

There was no action in regard thereto to refer or matter referable to the referee as such.

The question of jurisdiction is thus reduced to the questions arising out of the other damages and the construction of the terms of the order.

It seems to me as if there was intended, in fact, a transfer of the matters in dispute which were properly part of the jurisdiction of the referee, and as if the parties intend nothing else.

Curiously enough it turned out that the questions peculiarly fitted for that Court found no proper place there.

But I think we must look at such cases and references as if there was such matter proper for a reference. And if there happens to be such subject matter or reference it is clear to my mind it ought to be treated just as intended as if proceedings had been taken under the Drainage Act. Such I take it was the purpose of the order. And indeed such I take it is the purpose of the statute.

That being so we should not entertain a jurisdiction contrary to the intention of those concerned, who by their consent adopted that mode of disposing of the questions in dispute between them, just as if they had nominated an umpire to dispose of an action when no appeal would lie here.

I come no less readily to such conclusion because I quite agree after argument on the merits in reaching the same conclusion as the Court of Appeal.

I may say that the distinction drawn between the legal and illegal as exemplified in the cases of *North Shore Rly.* v. *Pion*,

14 A. C. 612; *Parkdale* v. *West*, 12 A. C. 602, and other such cases, has been duly considered, and I think disposed of by what I have said as to the duty cast upon the municipality which is its warrant of authority distinguishing the consequences therein, from those which resulted in these other cases. Appendix C.3

In those other cases the corporations acted without a shred of authority for they had none until they had complied with the conditions precedent to their respective entries in the respective lands in question therein, and when the result of their work had to be faced with the alternative of the removal of their trespassing works, it was clear they never intended to do so, but to abide by the consequences.

There seem to be many other difficulties in appellant's way. His complaint of the act of the respondent in restoring its highway, as it clearly had a right to, when the stream had removed it, seems absurd. That act was perfectly legitimate, even after ten years had elapsed. If he, instead of partly resting thereon, had rested entirely upon the rebuilding of the bridges, then he would be founding an action on an act more than two years before the reference, and hence beyond the power of the Court within the terms of section 99, sub-section 2, of the Drainage Act, upon which the order is founded, thus in other ways raising the question of our jurisdiction. To try to import the arbitration clause does not help.

Whilst the Referee is given incidentally the like powers of an arbitrator, he is not and cannot be treated as an arbitrator. As the course of appeal and path taken without regard to rules in arbitration cases, in fact here shew, that does not help.

The appeal must be dismissed with costs.

Duff, J.—I concur in the dismissal of the appeal.

Anglin, J.—The plaintiff (appellant) has, in my opinion, failed to make out a case upon the evidence for interference with the reductions made by the Court of Appeal in the amounts awarded by the Referee in respect of his items of damage, other than the alleged permanent injury to his lands. His main complaint, however, is that the judgment in appeal deprives him of the sum allowed him by the Referee as compensation for such permanent injury. The Court of Appeal was of opinion that the damages which the plaintiff had actually sustained from the flooding of his land, and not the acts of the defendants from which it resulted, were the gist of his cause of action. If that

Appendix C.3

be not so I am unable to understand how he can maintain any part of the judgment in his favor.

Having regard to the form of the order directing the reference, and to the facts that it is made to the Drainage Referee in that capacity, and not as a special Referee (*McClure* v. *Brook*, 5 O. L. R. 591), and that the plaintiff raised no objection to the regularity of the appeal from the Referee's report taken directly to the Court of Appeal, it is, I think, abundantly clear, as was held by that Court, that the reference was made to the Drainage Referee under section 99 of the Municipal Drainage Act, 10 E. VII. c. 90, and as authorized by that section, on the ground "that the action could be more conveniently tried before and disposed of by him." Had the parties wished to proceed under the reference clauses of the Arbitration Act, and to have the Drainage Referee named as a special Referee under them, they might have drawn the consent order in that form. It was, however, stated at bar, and not controverted, that it was on the application of counsl for the plaintiff, and with the consent of counsel for the defendant that the order was made in the form in which we find it. I have not the slightest doubt that the purpose of the parties was to obtain a reference under section 99 of the Municipal Drainage Act. Sub-section 2 of that section is as follows:—

"(2) This section shall apply only where the action is brought within the period limited by this Act for taking proceedings on notice."

Sub-section 3 of section 98 provides that:—

"The notice shall be filed and served within two years from the time the cause of complaint arose."

The last acts of the defendants which it is said caused, or contributed to, the overflowing of the plaintiff's lands were completed in October, 1907, although no actual damage ensued until the 30th of December following. The plaintiff's action was begun on the 28th of December, 1909.

If the plaintiff's "cause of complaint" is not the damage which is sustained, but the acts of the defendants from which that damage resulted—and it is only on that basis that he can recover for permanent injury in the nature of depreciation in the value of his property on account of its being liable to damage from future flooding—it is obvious that the action could not have been transferred or referred for trial under section 99 of the Drainage Act. It would follow that the transfer or reference was made without jurisdiction, that the subsequent proceedings before the Referee were *coram non judice*, and that

his judgment in the plaintiff's favor would be a nullity. Whatever might have been his rights had the action proceeded in the High Court in the ordinary course, or had the reference been under the Arbitration Act, he could not maintain a judgment in his favour procured in proceedings taken under section 99 of the Municipal Drainage Act, upon a cause of complaint which arose more than two years before his action was brought. Appendix C.3

Although the defendants have cross-appealed in respect of their liability, and of the quantum of the damages which the plaintiff retains under the judgment of the Court of Appeal, they have not appealed against the holding of that Court, that the plaintiff's cause of action arose only when he sustained damage, and that such damage is his real "cause of complaint." We are, therefore, not called upon to determine on this appeal, if it should be entertained at all, the very important question as to what constitutes the "cause of complaint," under such circumstances as this case presents; and I desire to be understood as not expressing any opinion on that point at variance with the views which obtained in the Court of Appeal. It suffices to say that whatever right of recovery the plaintiff may have under the procedure which he has seen fit to adopt must rest on the basis on which the Court of Appeal has put it. If that is not sound, all the proceedings since the order of reference was made have been *coram non judice*.

But in my opinion this appeal fails on another ground, on which the cross-appeal may also be disposed of. The order of reference was made by consent. The parties chose to take a reference under the Drainage Act rather than under the clauses of the Arbitration Act, which they might have had, and the order, as they framed it, refers the matters in dispute for trial to the Drainage Referee, "to be tried pursuant to the provisions of the (Municipal Drainage) Act," and provides that "all proceedings herein may be had and taken as if the action had originally been brought under and by virtue of the said Act."

I regard this consent order as an express acceptance by the parties of the machinery of the Municipal Drainage Act for the determination of the matters in dispute in the then pending action, including the limitations as to procedure and rights of appeal which the legislature in creating that machinery saw fit to impose upon its use. One of these limitations is contained in section 100 of the Act:—

"100. The decision of the Referee in all applications and proceedings under this Act, not otherwise provided for as being final and conclusive between the parties, shall be subject to

Appendix C.4

appeal to the Court of Appeal for Ontario, and its decision thereon shall be final, conclusive and binding upon all parties to the application or other proceeding." .

This provision was not in the Ontario Municipal Drainage Act of 1891, which was in force when *Ellice* v. *Hiles*, 23 S. C. R. 429, was decided, and no objection to the appeal being entertained appears to have been taken in that case.

While the power to take away a right of appeal to this Court which Parliament has conferred cannot be conceded to a provincial legislature, it is competent to litigants themselves at any stage of the proceedings to waive or forego any right of appeal which they may have. When they consented to the terms of the order of reference made in this case, in my opinion the parties waived their right to carry the litigation beyond the Ontario Court of Appeal. If the result of what they did is not to oust the jurisdiction of this Court, it affords sufficient reason for our exercising whatever discretion we may have to decline to entertain the present appeal and cross-appeal. Where the parties have themselves dealt with an action in such a manner that the fair inference is that they intended to forego any right of appeal beyond the provincial Courts, I think we may well hold them to their bargain, and refuse to entertain an appeal to this Court. In thus disposing of the cross-appeal, I do not wish to be understood as questioning the correctness of the judgment of the Court of Appeal in respect to the matters of which the defendants have complained.

APPENDIX C. 4.

The Trustees of Grosvenor St. Presbyterian Church v. The City of Toronto, May, 1918.

The Registrar.—This is a motion to affirm jurisdiction: Hellmuth, K.C., for motion; Fairty, contra.

The facts of this case as established by the material filed are as follows:—

On the 6th Jan. and 23rd Mar., 1914, the Council of the City of Toronto passed by-laws to extend and widen certain streets, which required the expropriation of certain lands owned by the appellants. Chapter 199 R. S. O., makes provision for expropriation where lands are required for city purposes, where the population of the city is not less than 100,000. The Act provides for the appointment by the Lieutenant-Governor-in-Council of an Official Arbitrator, who shall have all the powers

of a Judge of a Superior Court of Ontario. It further provides Appendix C.4
for a notice being given and filed with the Official Arbitrator, whose award may be appealed to a Divisional Court, and in default of an appeal within six weeks after notice of the filing of the award it shall be binding and conclusive upon al' the parties to the reference. The statute further provides that the municipality may repeal this by-law at any time after the expiration of six months from the date when it passed the by-law, and that upon such repeal the Act shall cease to apply or be in force in the municipality. On the 20th July, 1915, the appellants gave notice to the respondent to proceed with the arbitration with respect to the value of the parcels of land in question. On the 7th Dec., 1916, the Official Arbitrator made his award by which he adjudged that the City of Toronto should pay the appellants the sum of $57,500 in full compensation for the taking of their lands, etc. The award was duly filed pursuant to the statute, and it was not moved against or appealed from. On the 14th May, 1917, the respondents passed a by-law repealing the by-law under which the award had been made. The Arbitration Act, R. S. O. c. 65, s. 14, provides that "the award may, by leave of the Court or a Judge, be enforced in the same manner as a judgment or order to the same effect." The appellants moved before the Honorable Mr. Justice Masten for an order to enforce the award which was granted on the 9th Nov., 1917 (40 O. L. R. 550). The order after reciting the facts proceeded, "this Court doth order and adjudge that the contestants pay to the claimants the said sum of $57,500 with interest as aforesaid, with costs of this motion after taxation thereof." From this order an appeal was taken to the Second Appellate Division, and the judgment of Mr. Justice Masten was reversed, and set aside on the 21st Dec., 1917 (13 O. W. N. 302). From this decision an appeal is taken to the Supreme Court of Canada. No steps were taker to have the appeal to this Court allowed until more than 60 days had elapsed from the date of the judgment of the Appellate Division (Supreme Court Act, s. 60), but on the 23rd of March, the Honorable Mr. Justice Riddell made an order approving of the bond offered as security for an appeal to the Supreme Court of Canada. His order further provided that the time for settling the case and for appealing be extended for a period of 30 days from the date thereof. I am not satisfied that the latter clause had the effect of extending the time for the allowance of the appeal beyond the 60 days. It appears to contemplate only extending the time from the date of the order, but I am of the opinion that the

Appendix C.4

decision of *Gilbert* v. *The King*, 38 S. C. R. 207, and the other cases on p. 436 of Cameron's Supreme Court Practice, empower the judge to make an order after the 60 days had expired although the motion was not launched within the 60 days, and I am further of the opinion that the decision in the *Great Northern Rly. Co.* v. *Furness-Withy Co.*, 40 S. C. R. 455, authorizes me to hold that the order approving of the bond impliedly extended the time for accepting the security offered. This disposes of any objection which might be raised that the appeal had not been brought within the 60 days provided by section 69 of the Supreme Court Act, or that the time had not been properly extended within the provisions of section 71 of the same Act. The substantial question then before me is to determine whether or not an appeal in an action not begun by a writ of summons, but by a notice of motion and based upon an award of an arbitrator is appealable to this Court, either under section 39 of the Supreme Court Act which, by sub-section (*b*). provides that an appeal shall lie from the judgment on any motion to set aside an award or upon any motion by way of appeal from an award made in any Superior Court in any province of Canada other than the Province of Quebec, or under section 36, which provides that an appeal shall lie to the Supreme Court from any final judgment of the highest Court of final resort in cases in which the Court of original jurisdiction is a Superior Court.

I am of the opinion that 39 (*b*) has no application to this case. The motion was not to set aside an award nor by way of an appeal from an award, but a motion to enforce an award under the provisions of section 14 of the Arbitration Act. I am however of the opinion that an appeal lies under section 36. The method adopted in obtaining the judgment of the Court was a summary one, but was quite as effective as if the proceedings had been commenced by the issue of a writ of summons, which would have been the procedure under the old practice. Proceeding by way of an originating summons or notice is provided for in many of the provinces of Canada. In Ontario there is the express provision for it in matters where rights of the parties depend upon the construction of any contract or agreement, and there are no material facts in dispute (Rule 605). This was the procedure adopted in the case of *Wood* v. *Valance*, which was appealed to this Court, and is reported in 53 S. C. R. p. 51. In that case, indeed, a motion to quash for want of jurisdiction was made in the Supreme Court. It is true that the objection to the Court's jurisdiction was that there was nothing

to indicate in the case that more than $1,000 was involved. The action was one for the construction of a partnership agreement, but if there was no jurisdiction on the ground that proceedings had commenced by an originating notice, there is no doubt that the objection would have been taken either by counsel or by the Court. Appendix C.4

I am therefore of the opinion that the fact that the proceedings were based upon an award of an official arbitrator, and that by the Arbitration Act the award may be enforced in the same manner as a judgment, does not prevent my holding that the proceedings which have resulted in the present appeal began by the notice to enforce the award which originated in a Superior Court, and as the judgment is a final judgment of the highest Court of final resort in the Province of Ontario, an appeal lies under section 36 to this Court. It was contended that inasmuch as section 39 provides for an appeal in two classes of cases arising out of an award of an arbitrator that I should hold that the provisions of section 36 do not apply at all to awards or to any of the classes of cases in which an appeal is given by section 39. The decision, however, in *Shawinigan* v. *Shawinigan,* in this Court, 43 S. C. R. 650, is a complete answer to any such contention. In that case Mr. Justice Anglin says, at p. 662, "the special jurisdiction conferred by section 39 (*e*) is supplementary, it does not exclude the general appellate jurisdiction conferred by section 36, in a case otherwise appealable."

Respondents' counsel in the present application relied strongly upon the decision of *Langley* v. *Duffy,* reported in Cameron's Supreme Court Practice, at p. 144. This was a case in which a motion to enforce an award was made to the Supreme Court of British Columbia, and an appeal taken from the first judgment to the Full Court where an order was made allowing respondent Duffy to enter judgment for the amount of the award. From this judgment an appeal was taken to the Supreme Court of Canada, but the appeal was quashed for want of jurisdiction. At first blush this decision is very strongly in respondents favor, as it might well be argued that the Court would not have quashed the appeal on the ground that the judgment appealed from was not a judgment upon a motion to set aside an award nor a judgment upon a motion by way of an appeal from an award (R. S. C. c. 135, s. 24 (*f*), now 39 (*b*)), if an appeal did lie under section 24 (*a*) of the old Act, which gave an appeal from all final judgments of the highest Court of final resort, where the Court of original jurisdiction was a Superior Court. The judgment in *Langley* v. *Duffy* was

Appendix C.4

in 1899, and therefore previous to the revision of the statutes in 1906.

In considering the decisions of the Supreme Court prior to the revision, it is important to remember that the sections dealing with the appellate jurisdiction of the Court have been entirely redrafted. The present Supreme Court Act is based, not only upon the language of the old statutes, but embodies the judicial interpretation placed upon the statutes by the Supreme Court.

During the course of revision of the Public General Statutes of Canada (1906), at the request of the then Minister of Justice, I drafted the present sections dealing with the appellate jurisdiction of the Court, and had the same, with a memorandum, sent to the Judges and Bar Associations of Canada for suggestions and criticisms (Can. Law Review, Vol. 3, p. 377). In that memorandum, at p. 382, it is said:—

"Section 24 (*a*) of the old Act provides generally for an appeal to the Supreme Court from all final judgments of the highest Court of final resort, in cases in which the Court of first instance was a Superior Court. Section 24 (*b*), (*c*), (*d*), (*e*), (*f*) and (*g*) are not in terms said to be governed in any way by 24 (*a*). They form clauses which it might reasonably be argued are quite independent of 24 (*a*) and as they do not use the word "final" with respect to judgments as 24 (*a*) does, it might be contended that the judgments referred to in these sections were appealable, whether final or not.

"It is true, section 28 provides that appeals shall lie only from final judgments, but it is preceded by the words, 'except as provided in this Act,' and there is nothing to shew that the sub-sections of 24 are not included in this exception.

"Section 24 (*d*), which provides for an appeal from a judgment upon a motion for a new trial, undoubtedly refers to interlocutory and not final judgments. This is in accordance with the recognized jurisprudence in every province of Canada, and has been expressly affirmed by the Judicial Committee of the Privy Council: *S. E. Rly. Co.* v. *Lambkin*, 22 L. C. J. 21.

"Section 24 (*g*) provides for appeals from judgments in any case of proceedings for or upon a writ of *mandamus*. Now shortly after the establishment of the Court, in 1879, in a case decided under the original Supreme and Exchequer Courts Act of 1875, Sir Henry Strong expressed the opinion that appeals in cases of *mandamus, habeas corpus* and municipal by-laws were not restricted to final judgments: *D'Anjou* v. *Marquis*, 3 S. C. R. 251.

"More recently the Court was divided upon the point,—the majority of the Court holding that no appeal lay in a case of mandamus, except from a final judgment; Sir Henry Strong being of the opinion that upon the express words of the statute there was an appeal, and from the further consideration, that if appeals in *mandamus* proceedings were confined to final judgments, it would, under the Ontario system of procedure, be useless; while Patterson, J., says: 'The only reference to final judgments contained in section 24 is in art. (*a*), which specifies final judgments of the highest Court of final resort in any province. No restrictive words, such as 'final judgments only,' are used. The article has no grammatical connection with the subsequent articles, and some of those subsequent articles specify judgments which obviously may not be final.' (*Langevin* v. *St. Marc*, 18 S. C. R. 599).

"The jurisprudence, however, of the Supreme Court now is settled in favor of the construction that 24 (*a*) does govern sub-section 24 (*g*): *Langevin* v. *St. Marc* (*supra*).

"Similarly it has been held by the Court that sub-sections 24 (*b*), (*c*) and (*f*) refer only to final judgments, while there is complete unanimity that sub-section 24 (*e*) is not limited to final judgments.

"It will be seen, therefore, in respect to the subdivisions of this section that it has necessitated a considerable line of *judicial legislation*, as it has been called, to determine the cases in which the word 'judgment' means final judgment. All of this difficulty would have been obviated if the legislature had clearly expressed its intention when this section of the Act was being framed."

From this it is obvious that in considering decisions of the Supreme Court before the revision we must always have in view the language of the statute as it was at the date of such decision, and that in many cases in which the jurisdiction might at that time have been considered as obscure are not so any longer in view of the alterations made by the revision of 1906.

The order of Mr. Justice Masten directs the payment of $57,500. The case therefore is appealable in so far as section 48 of the Supreme Court Act is concerned. I am, therefore, of the opinion, for the reasons above stated, that this Court has jurisdiction, and the motion for an order affirming the jurisdiction of the Court should be granted.

Motion allowed, costs in the cause.

This case was subsequently heard on the merits in the Supreme Court, no question of jurisdiction being raised.

Appendix C.5

APPENDIX C. 5.

Bradshaw v. Newman, March 26, 1917.

The Chief Justice. — This is an appeal from an order made by the Registrar affirming the jurisdiction of the Court. When the case came on for hearing at the trial, exception was taken to the status of the plaintiffs on the ground that they were alien enemies living beyond the jurisdiction; on that ground the action was dismissed out of the Court with costs, with leave to the plaintiffs to bring a further action after the war. On appeal to the Court of Appeal, a new trial was ordered. It is now contended that the judgment at the trial was not final, and that no appeal lies here.

The trial Judge absolutely and finally determined a substantive right of the plaintiffs when he dismissed the action, thereby finally disposing of their rights in that action (3 & 4 G. V. c. 51, s. 1). The judgment of the Court of Appeal reverses that judgment and grants a new trial, and from that judgment there is an appeal under section 38 of our Act.

Idington, J. (dissenting).—The defendant moved to set aside a writ, which he had been served with in a suit to enforce the payment due on account of an alleged purchase of land in British Columbia, on the ground that plaintiff was an alien enemy. The Judge before whom the motion came enlarged it for hearing before the trial Judge who, instead of trying the case and disposing of case and motion together, heard only the motion, and allowed it, and directed a dismissal of the action.

On appeal the Court reversed that order and directed the case to go to trial.

From the latter order an appeal has been taken here and affirmed as to the question of jurisdiction by an order of the Registrar.

From the last mentioned order the original plaintiff appeals, contending, rightly as I think, that all that which has taken place below concerns procedure only, and hence is not as a matter of course appealable here.

There is nothing to prevent the question of incapacity to sue being brought up and fought out on the merits, if any, which may appear at the trial.

Then, if the trial Judge find no other defence than this of an alien enemy, and fails to give effect to it through respect for the opinion of the Appellate Court, the defendants will have a clear right to come here in due course as from a final judgment.

If well advised, however, he will consider before doing so the recent case of *Tingley* v. *Mueller*, reported in the Weekly Notes, as decided by Mr. Justice Eve. Appendix C.5

I am unable to see how the proposed appeal can be rested upon section 38 (*b*) of the Supreme Court Act which provides for the case of any motion for a new trial.

It is not what people choose to call that which has taken place but that which in fact did take place that we must look at.

There never was the slightest pretence of a trial, and it borders on the comical to refer to the judgment below as granting a new trial.

It is no more so than if the trial Judge should strike a case off the list, and by some inconceivable, misplaced obstinacy a plaintiff had to apply to the Court of Appeal to get it restored.

Then on the alternative ground of substantial rights being bound, we have the recent judgment of this Court in the case of the *St. John Lumber Company* v. *Roy*, 53 Can. S. C. R. 310, which decided that the choice of forum there in question only involved a matter of procedure, and hence no appeal here.

I respectfully submit that involved a very much more important principle of procedure and more substantial right than anything in this case does.

The appeal from the Registrar should be allowed, and the proposed appeal quashed with costs.

Duff, J.—The judgment of the learned trial Judge was in the following terms:—

"This action coming on for trial the 12th day of June, A.D. 1916, before the Honorable Mr. Justice Macdonald in the presence of counsel for the plaintiffs and for the defendants respectively, and upon the application of the defendants for an order to set aside the writ of summons herein and the service of the writ of summons on the ground that the plaintiffs are German subjects and alien enemies of the British Empire and live beyond the jurisdiction of this Court, which application was by order dated the 19th day of February, A.D. 1910, of the Honorable Mr. Justice Clement, enlarged to be disposed of by the trial Judge, and it appearing that the further hearing of the said application by the defendants, and the trial of this action was—upon the application of the plaintiffs—postponed to this 28th day of June, A.D. 1916, by order dated the said 12th day of June, A.D. 1916, of the said Honorable Mr. Justice Macdonald in order that the plaintiffs might have an opportunity of procuring certified copies of alleged certificates

Appendix C.5

of their naturalization as British subjects; and the postponed further hearing of the said application, and the postponed trial of this action having come on this day before the said Honorable Mr. Justice Macdonald, in the presence of Mr. George E. Martin, of counsel for the plaintiffs, and Mr. G. H. Dorrell and Mr. Donald Smith, of counsel for the defendants respectively, and upon reading the writ of summons herein the conditional appearance entered for defendants herein, notice of motion herein dated the 26th day of January, A.D. 1916, the affidavit of the defendant, Henry Bradshaw, sworn the 25th day of January, A.D. 1916; the affidavit of Donald Smith, sworn the 26th day of January, A.D. 1916, and relative exhibits; the affidavit of the plaintiff, Gustav Newman, sworn the 27th day of January, A.D. 1916; the affidavit of the plaintiff, Gustav Newman, sworn the 28th day of June, A.D. 1916, all filed herein, and the pleadings and proceedings in this action, and upon hearing counsel for the defendants and the plaintiffs respectively.

"It is this day adjudged that this action do stand dismissed out of this Court with costs, with leave to the plaintiffs to bring such further action as they may be advised after the war;

"And it is further adjudged that the defendants recover against the plaintiffs their costs to be taxed."

I think the effect of this is that the learned trial Judge treated the hearing of the application to strike out the writ as merged in the trial, and that his judgment was a judgment at the trial, and that his judgment dismissing the action, on the ground of the plaintiffs' want of *locus standi;* and the Court of Appeal seems to have treated it as such.

That being so, the appeal was in substance a motion for a new trial, and the judgment disposing of the motion is appealable under section 38 of the Supreme Court Act.

But if the proper view is that the judgment of the trial Judge was merely a judgment on the application to strike out the writ, then the judgment of the Court of Appeal must be taken, I think, finally to determine the status of the plaintiffs in respect of the action, and is a judgment in part determining finally substantive rights (the right to sue) within the meaning of the amending Act of 1913, and on that hypothesis also is appealable under that statute.

Davies, J.—I concur.

Anglin, J.—A motion to set aside a writ of summons in this action on the ground that the plaintiff as an alien enemy

had no status to sue was referred to the trial Judge. By his statement of defence in the action the defendant pleaded that the plaintiff was an alien enemy, and therefore, had no status to maintain the action, and he also denied the indebtedness sued for. The trial Judge dealt only with the first defence, which he sustained, and thereupon dismissed the action. The Court of Appeal held that the plaintiff was not an alien enemy, and ordered a new trial. It is obvious that on such new trial the only issue open would be that raised by the plea *non indebitatus*. The defendant appeals to this Court from the judgment of the Court of Appeal. Appendix C.6

On motion before him the Registrar has affirmed the jurisdiction of the Court. The plaintiff appeals from his order on the ground that the judgment of the Court of Appeal is not a final judgment.

I think it is. Unless appealed from it finally established that the plaintiff is not an alien enemy, and it conclusively decides that issue in his favor. That, in my opinion, amounts to a determination of a substantive right of one of the parties in controversy in the action within clause (*e*) of section 2 of the Supreme Court Act, as enacted by 3 & 4 G. V. c. 51, s. 1.

I also incline to the view that the judgment of the Court of Appeal may be appealable under section 38 (*b*) of the Supreme Court Act, though it should be regarded as not final in its character.

I would dismiss the appeal from the order of the Registrar with costs.

Brodeur, J.—I am of opinion that the motion should be dismissed with costs, and that the judgment of the Registrar affirming our jurisdiction should be confirmed.

APPENDIX C. 6.

Forget v. Lachine Jacques Cartier & M. Ry. Co., May 4, 1915.

The Registrar.—This is a motion to affirm the jurisdiction of the Court. The facts appear to be as follows:—

Pursuant to the provisions of the Railway Act, arbitrators were appointed to determine the compensation to be paid to the plaintiff for certain lands expropriated for purposes of the railway. The arbitrators made their award on March 6th, 1913, by which the plaintiff was allowed $520.28 for the property taken and the damages resulting from expropriation. The

Appendix C.6

plaintiff, dissatisfied with the award, brought an action in the Superior Court of Quebec, asking to have the award set aside on various grounds, amongst others that the amount awarded was insufficient, that the arbitrators had failed to allow the plaintiff for the injury to the plaintiff's other property which had not been expropriated; that the arbitrators had acted illegally in refusing to accept certain proof offered by the plaintiff, and had illegally accepted proof presented by the defendants; that the value of the lands taken was $2,800, and that the injury to the adjoining property was at least $1,400. The action was tried by Mr. Justice Mercier, who on Febr. 5th, 1914, pronounced judgment dismissing the action. An appeal was taken to the Court of King's Bench, which was dismissed on Jan. 21st, 1915. The plaintiffs thereupon took an appeal to this Court, and security was duly allowed by the Court below on Feb. 1st, 1915. The two grounds upon which the motion is based are that the matter in controversy relates to titles to lands or tenements and other matters, and things where rights in future might be bound, and secondly that the amount involved is over $2,000.

I am of the opinion that there is no jurisdiction to hear this appeal. I am unable to perceive any distinction in principle between an action brought to set aside an award of arbitrators and an action for prohibition taken to prevent the arbitrators from making an award.

This Court has held that the collateral effect which may result from a judgment of the Court below cannot be looked at when determining a question of its jurisdiction, and although in an action for prohibition or injunction, titles to lands may be affected or the amount in controversy may be more than $2,000, this will not confer jurisdiction on the Court See *Toussignant* v. *Nicolet*, 32 S. C. R. 353; *Brice* v. *Tanguay*, 42 S. C. R. 133, and *Desormeaux* v. *Ste Therese*, 43 S. C. R. 82; *Molson* v. *Jacques Cartier* (unreported).

I fail to see any distinction in principle between such actions and the present one, where the proceeding is taken to set aside an award of the arbitrators in a railway expropriation case. A determination of such an action will not finally affect the title to the property expropriated. The making of the award does not operate as a parliamentary or statutory conveyance of the property to the company. It is only after the compensation has been paid into Court (which has not been done in the present case), and the delivery to the Court of a copy of the award that the title passes under section 210 of the Railway Act. If

the award is set aside, it simply means that new proceedings under the Railway Act will have to be taken, similarly, the setting aside of the award will not determine the compensation to be paid. The motion is, therefore, refused with costs. Appendix C.7

May 4th, 1915, an appeal from the judgment of the Registrar to the Court was dismissed with costs.

APPENDIX C. 7.

Cassidy v. City of Moosejaw, March, 1917.

Chief Justice.—Although this is an application for leave to appeal, and in the alternative for an order affirming the jurisdiction and allowing the security, it is more convenient to consider the alternative application first, because if there is an appeal *de plano*, there is no necessity for considering the application for leave.

The facts of the case as set out in the judgment of Mr. Justice Newlands in the Supreme Court of Saskatchewan, are shortly as follows: "The plaintiff was the owner of certain lots in the City of Moosejaw, abutting upon a number of streets, one of which was Grey Street. Under an agreement between the city and the G. T. P. Railway, the former agreed to close part of Grey Avenue, which had the effect of cutting the plaintiff's lots from all exit to the south. The plaintiff claimed $2,000 compensation, which the city refused, whereupon the plaintiff dissatisfied with the amount offered, proceeded to have the compensation determined by arbitration under the provisions of the City Act, which was revised and consolidated by chapter 16 of the Statutes of 1915 of the Province of Saskatchewan.

Section 370 of this statute provides that where the compensation was not agreed upon, the amount should be determined by the award of an arbitration appointed by a Judge of the Supreme Court. The application was made to Mr. Justice McKay, of the Supreme Court of Saskatchewan, who appointed as sole arbitrator, Judge Ousley, of the District Court. The arbitrator made an award in favor of the plaintiff for $400.

Section 379 of the statute provides as follows:

"In every case where the amount of the claim exceeds $1,000, an appeal shall lie to the Supreme Court *en banc* in like manner as from a judgment or decision of the District Court or a Judge thereof."

Appendix C.7

The city appealed from the award to the Supreme Court *en banc*. The notice of appeal which is set out in the papers filed, proceeds as follows:—

"Take notice that a motion will be made to the Supreme Court of Saskatchewan *en banc*, etc., by way of appeal from the award of His Honor Judge Ousley, acting as arbitrator herein, etc., to set aside and vary the said award as to the Supreme Court *en banc* aforesaid may seem just on the following among other grounds, etc."

No exception was taken to the jurisdiction of the Supreme Court of Saskatchewan, and that Court finally gave judgment dismissing the appeal. It appears to me that this Court has jurisdiction under section 39, sub-section (*b*), which provides as follows:—

"Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from the judgment upon any motion to set aside an award or upon any motion by way of appeal from an award made in any Superior Court in any of the provinces of Canada other than the Province of Quebec."

The present case seems to me to be governed by the decision of this Court in *Toronto Junction* v. *Christie*, 25 S. C. R. 551. That case was one in which the lands of Christie had been injuriously affected by the Town of Toronto Junction altering the grade of the streets. The Consolidated Municipal Act, 1892, then in force, provided for an arbitration, and by section 404 (55 V. 42), provided that every award should be subject to the jurisdiction of the High Court. Christie, dissatisfied with the award, moved to set it aside before one of the Judges of the High Court, and his motion was granted, and the award increased from $200 to $1,000, 24 O. R. 443. The corporation thereupon appealed to the Court of Appeal when the judgment below was affirmed, the Court being equally divided (22 O. A. R. p. 21). A further appeal was taken by the town to the Supreme Court of Canada, which was heard on the merits, and the appeal dismissed with costs.

In both these cases, therefore, we have proceedings instituted under the Municipal Act to obtain compensation for lands injuriously affected. In both cases provision is made by the Act itself for a motion to set aside the award to the Superior Court of the province, and in both cases we have a final judgment of the highest Court of last resort in the province.

I am therefore of the opinion that the security offered, as to which there is no exception taken, should be allowed.

Davies, J.—I am of the opinion that there is a right of appeal to this Court in this case, and that our jurisdiction should be affirmed. Appendix C.7

As to the application for leave I do not think the case one in which special leave should be granted if the right to appeal did not exist.

No costs to either party under the circumstances of the double application.

Idington, J.—This being, as I understand, an application for leave to appeal from a judgment of the Court of last resort on a motion to set aside an award under section 39, sub-section (*b*), is one in which no leave is necessary, and hence that part of the motion must be refused.

Whether or not we should affirm the jurisdiction instead of leaving the parties to pursue the prescribed course for allowing such an order, may be within our power, but I rather think we should not establish such a precedent.

Duff, J.—The Supreme Court of Saskatchewan sitting *en banc*, held that it had jurisdiction to entertain the appeal of the City of Moosejaw. On that appeal judgment was given in favor of the respondent Cassidy, dismissing the appeal with costs, and that judgment appears to be duly perfected. *Prima facie* there is clearly an appeal to this Court under section 38, sub-section (*b*). Mr. Chrysler argues, however, that there was no right of appeal from the District Judge to the Supreme Court *en banc*, and that the Supreme Court being without jurisdiction, no appeal will lie to this Court. This contention if made good would no doubt be an answer to the appeal on the merits because this Court cannot, of course, validly pronounce judgment reversing or varying an award which is not appealable. But the question does not, I think, arise at this stage. The Supreme Court has explicitly held that an award was appealable, and that judgment is binding on the parties until reversed in a competent proceeding. The appeal must, I think, be allowed to proceed.

Anglin, J.—The City of Moosejaw would appeal from a judgment of the Supreme Court of Saskatchewan upholding an award of $400 as compensation for the closing of a lane, made by the Judge of a District Court, acting as arbitrator, under 5 G. V. (Sask.) c. 16, ss. 509 and 370.

Appendix C.8

Apparently fearing that the case might be regarded as having originated in an inferior Court, the prospective appellant moved for leave to appeal under section 37 (*c*) of the Supreme Court Act. In the alternative he seeks an order affirming the jurisdiction of the Court to entertain the appeal under section 39 (*b*).

If the case were one in which leave to appeal were necessary I should unhesitatingly refuse leave. No case is made for granting it. But I think that section 39 (*b*) applies, and that an appeal therefore lies without leave, and as of right. An order affirming jurisdiction should be granted, but, under the circumstances, without costs.

APPENDIX C. 8.

Lachine, Jacques Cartier & M. Ry. v. Molson & al., December 23, 1914.

The Chief Justice.—This is a motion to quash for want of jurisdiction.

The sole question involved is whether there is anything in the facts of this case which distinguish it from those of *Desormeaux* v. *Ste. Therese,* 43 S. C. R. 82, where it was held that no appeal lies to the Supreme Court from the Court of King's Bench in the Province of Quebec in a matter of prohibition. In the present case the Court of Review confirmed a judgment of the Superior Court which quashed a writ of prohibition. Section 40 of the Supreme Court Act provides for an appeal to the Supreme Court from a judgment of the Court of Review:—

"Where that Court confirms the judgment of the Court of first instance, and its judgment is not appealable to the Court of King's Bench, but in appeal to His Majesty in Council."

The provisions for an appeal to the Privy Council from the Court of Review are contained in Art. 69 of the Code of Civil Procedure, which reads as follows:—

"Causes adjudicated upon in review which are susceptible of appeal to His Majesty in His Privy Council, but the appeal whereof to the Court of King's Bench is taken away by Arts. 43 and 44, may nevertheless be appealed to His Majesty."

The meaning of this article is that causes adjudicated upon in the Court of King's Bench, which would have been subject of a further appeal from the Court of King's Bench to the Privy Council, are now the subject of an appeal direct from the Court of Review to the Privy Council. In order to determine whether this case would have been appealable to the Privy

Council from the Court of King's Bench, we have to look at Art. 68 of the Code of Civil Procedure, which reads as follows:— Appendix C.8

68.—An appeal lies to His Majesty in His Privy Council from final judgments rendered in appeal by the Court of King's Bench:—

1. In all cases where the matter in dispute relates to any fee of office, duty, rent, revenue or any sum of money payable to His Majesty.
2. In cases concerning titles to lands or tenements, annual rents or other matters by which the rights in future of the parties may be affected.
3. In every other case where the amount or value of the thing demanded exceeds five thousand dollars.

If we now compare the provisions of Art. 68 with the provisions of section 46 of the Supreme Court Act, it will be perceived that there is nothing in that article which would authorize an appeal in a matter of prohibition, if there is no appeal in a case of prohibition under section 46 to the Supreme Court of Canada. If this is so, then the judgment of this Court in *Desormeaux* v. *Ste. Therese* is entirely in point, and if a case is not appealable to the Supreme Court from the Court of King's Bench, it is equally not appealable from the Court of Review.

The appellant relied upon what was said by the Court of Appeal in the case of *Dobie* v. *Board of Temporalities*, reported in 3 Legal News, p. 308. There Sir A. A. Dorion, C.J., said:—

"The report of *O'Farrell & Brassard*, 4 Q. L. R. 214, was not quite correct. It had not been held that no appeal lay from a prohibition, but that no appeal lay where there was no matter in dispute exceeding the sum or value of £500 stg. The same may be said of the short holding in *Pacaud & Gagné*. Mondelet, J., said that this case did not fall within any of the dispositions of the statute regulating appeals to Her Majesty (p. 375). The appeal was also refused on the same ground in *Bellefeuille & Doucet*. But we granted the appeal in *Joly* v. *Macdonald*, 2 Legal News 104, because there was in dispute a sum greatly exceeding that amount, and therefore leave to appeal should be granted. Leave to appeal is granted, however, without suspending the effect of the judgment dissolving the injunction."

Particulars of the case of *O'Farrell & Brassard* are set out in the first volume of the Legal News on p. 25, and the judgment of the Court of Appeal on p. 32 of the same volume. This was

Appendix C.S a case in which the Bar Society of the Province of Quebec had found O'Farrell guilty of conduct derogatory to the honor of the bar, and had condemned him to suspension and to payment of the sum of $400 to Brassard. O'Farrell obtained a writ of prohibition to restrain the proceedings. The Superior Court of Review quashed it. On appeal to the Court of Queen's Bench the judgment of the Court of Review was reversed. Thereupon an application was made for leave to appeal to the Privy Council under Art. 1178 of the Code of Civil Procedure, which article is now reproduced in Art. 68 above set out. The report of this last application is to be found in 4 Quebec Law Reports, p. 214, which simply says:—

"Held that there is no appeal from the judgment of this Court to Her Majesty in Privy Council in a matter of prohibition."

It will be observed that the Chief Justice does not say there is an appeal in every case of prohibition, but at most, that if there is a sum of £500 stg. involved in the matter in dispute, although it is a prohibition proceeding, an appeal would lie, In support of his holding the Chief Justice points out what the Court of Appeal had done in certain other cases where the proceedings were by way of writ of injunction, and where leave to appeal had been granted, when the amount involved was £500 stg. Applying these cases, the Court granted leave to appeal in the case of *Dobie* v. *Board of Temporalities*, then before them.

It is not necessary for the disposition of the present motion to determine whether on the facts of this case the Court of Appeal at the time that *Dobie* v. *Board of Temporalities* was decided, would have felt bound under its previous decisons to hold that this was a case in which the applicant was entitled to leave to appeal to the Privy Council. The decisions of the Court of King's Bench are not binding upon us, and the fact that the relief granted in the case of *Dobie and Board of Temporalities* was recognized by the Judicial Committee, where the appeal was heard on the merits, cannot affect the question because the Committee, if objections were taken to the power of the Court of Queen's Bench to grant leave, would no doubt have held that it itself had such power.

The jurisprudence of the Supreme Court, as settled in the matter of prohibition in the case of *Desormeaux* v. *Ste. Therese* above mentioned, and by the decisions as regards injunctions of *Price* v. *Tanguay*, 42 S. C. R. 133, is now well established, namely, that no appeal will lie under the language of section 46 of the Supreme Court Act unless the matter in controversy

in the action, suit, cause, matter or other judicial proceeding is one which directly and not collaterally comes within the specific terms of that section. I do not see how we can place a different interpretation upon the language of article 68 with respect to appeals to the Privy Council where the language is substantially the same as section 46 of the S. C. Act. Appendix C.9

Sir Louis Davies.—I concur with the Chief Justice.

Idington, J.—I concur with the judgment of the Chief Justice.

Anglin, J.—The question of jurisdiction is concluded adversely to the appellant by the decision in *Desormeaux* v. *Ste. Therese*, 43 S. C. R. p. 82.

APPENDIX C. 9.

The Attorney-General of Canada (Doherty) v. City of Levis, March 26, 1917.

The Chief Justice.—This is a motion to quash for want of jurisdiction. The claim brought by the Crown is for a *mandamus* preventing the City of Levis from cutting off a water supply to the premises occupied by the Crown in the City of Levis. The claim of the Crown is that under the by-law the amount that it should pay was fixed at $250, which sum it has always been ready and willing to pay. The defence was that the by-law and agreements only covered water supply to the post office, and that, since then, the Crown had made use of the building for other purposes, and the municipality was entitled to a larger sum of money which it had fixed at $50. It also claims that the Crown had cancelled the old agreement by certain correspondence which had passed between them.

The action was tried on the merits by Mr. Justice Lemieux, who held that the Crown had put an end to the contract, and therefore dismissed the action. This judgment was affirmed by the Court of Review. The Crown now desires to appeal to the Supreme Court, and claims that it is entitled to come under section 39, which gives an appeal in the case of *mandamus*. It also claims that it can come under section 40, which gives an appeal from the Court of Review where the case is not appealable to the Court of King's Bench, but is appealable to the Privy Council. It claims that this is a matter that would be appealable to the Privy Council under the provisions which

Appendix C.9

give an appeal in cases of annual rents or other matters in which rights in future of the parties might be affected.

The claim that an appeal lies under section 39, irrespective of the Court from which the appeal is taken, does not seem warranted. Section 39 begins by using the following words: "except as hereinafter otherwise provided an appeal shall lie, etc." That clearly brings in section 40. To hold otherwise would entitle the parties to bring an appeal direct from the Court of first instance. Although the language of the Code of Civil Procedure (Art. 68) made applicable by section 40 of the Supreme Court Act, differs in its phraseology from that of section 46, there is apparently no substantial difference, and the decisions of this Court on the words "annual rents or other matters or things where rights in future might be bound," are applicable.

I do not see how there is any question of annual rents involved at all. The action is to restrain the municipality from doing something. There is no demand for a specific sum of money. The granting or refusing of the claim simply determines whether or not a contract between the parties has been abrogated. and if in force the only amount due on it would be on the pleadings, a sum of $300.

Idington, J.—I think this appeal should be quashed on the ground taken that as to *mandamus* an appeal from the Court of Review will not lie to the Judicial Committee of the Privy Council.

And as to any other ground, such as binding future rights, it does not seem to me tenable in the light of the general jurisprudence of this Court touching any such like basis.

Anglin, J.—This case does not fall within articles 68 and 69 of the Code of Civil Procedure, and is therefore not appealable *de plano* to the Judicial Committee of the Privy Council. It follows that it is not appealable to this Court under the exceptional provision of section 40 of the Supreme Court Act, which alone confers jurisdiction to entertain appeals from the Court of Review. The provision of section 36 restricting our jurisdiction to "appeals from final judgments of the *highest Court of last resort*, now or hereafter established in any province of Canada," governs appeals under section 39. An appeal to this Court does not lie under that section from the Court of Review unless the case falls within section 40.

The motion to quash the appeal should therefore prevail.

APPENDIX C. 10.

La Cie Des Boulevards v. Cartierville, December 11, 1916.

The Chief Justice.—Motion to quash for want of jurisdiction.

This was an action in which the plaintiffs claimed from the defendants, the present appellants, $778 for municipal taxes, alleging that they (the defendants) were the proprietors of certain lands within the municipality which were legally liable for the taxes.

The defendants, amongst other things, set up that there was a fixed assessment of the properties for the previous six years, at $200 per annum, pursuant to a by-law of the plaintiffs, and the latter by their reply deny the validity of the by-law. The issue here is as to the validity of this by-law, but the difficulty arises because that issue is raised by the plea. On page 245 *et seq.* of Cameron's Practice will be found a number of cases collected, in which this Court held that it had jurisdiction where the amount was under $2,000, and the proceedings were to recover or to prevent the collection of taxes payable under municipal by-laws. On page 247 *et seq.* are collected cases in which the Court denied jurisdiction. I find it impossible to harmonize these decisions. In the most recent case of *Outremont* v. *Joyce*, 43 S. C. R. 611, the motion to quash was granted.

I am still of the opinion expressed in *Shawinigan* v. *Shawinigan*, reported in 43 S. C. R. p. 650, but the majority did not concur with me.

This is not, it is quite true, a proceeding to annul or set aside a by-law, but *the nullity of the by-law is set up as a defence to the action* and, as I have already said, the real issue is as to the validity of this by-law, and I would be of opinion that we have jurisdiction were it not that this appeal is from a judgment of the Court of Review. In this case we have this anomaly that although this case would be appealable if it had been decided by the Court of last resort in the province, we are without jurisdiction because of the special provisions of our Act applicable to appeals from the Court of Review, an intermediate Court of Appeal. However, we must apply the law as we find it, and I would allow the motion to quash for the reasons given by Mr. Justice Brodeur.

Anglin, J.—I would grant this motion on the ground that the only matter in controversy within section 46 (*c*) of the

Appendix C.10

Supreme Court Act is the overdue taxes amounting to less than $2,000, which the plaintiffs sue to recover.

Brodeur, J.—L'Intimée demande le renvoi de l'appel en disant que nous n'avons pas juridiction. L'action instituée par l'Intimée avait pour objet de recouvrer de l'appelant le paiement de taxes municipales au montant de $778.52.

La défenderesse appellante alléguait en défense qu'en vertu d'un règlement adopté par l'Intimée, ses terrains ne devaient pas être chargés que d'une taxe annuelle de $200.

L'Intimée a prétendu que ce règlement est illégal et qu'elle avait le droit de réclamer le montant des taxes auquel l'évaluation municipale lui donnait droit.

Toute la question dans cette cause est donc de savoir si ce règlement est légal ou non. La Cour Supérieure et la Cour de Revision en ont prononcé l'illégalité et le propriétaire appelle de ces jugements. Nous avons maintenant à décider si nous avons juridiction.

L'appelant se base sur la sous-section (*e*) de la section 39 de l'acte de la Cour Suprême qui autorise l'appel dans les cause concernant les règlements municipaux.

Mais il ne faut pas oublier que notre juridiction dans les causes où le jugement est rendu par la Cour de Revision ne peut s'exercer que dans les cas où ce jugement est susceptible d'être porté devant le Conseil Privé (section 40). La section 39 de l'Acte de la Cour Suprême ne peut donc pas être invoquée; mais nous devons avoir recours aux dispositions du Code de Procédure Civile pour décider si nous avons juridiction (Arts. 43, 44, 68 and 69 C. P. C.).

L'article 68 qui est le plus important dit qu'il y a appel au Conseil Privé "lorsqu'il s'agit de droits immobiliers (title to lands) rentes annuelles ou autres matières qui peuvent affecter les droits futurs des parties."

Cette disposition est rédigée dans les mêmes termes que la dernière partie de la sous-section (C), de la section 46, de la l'Acte de la Cour Suprême, excepté qu'on a dans la version francaise de notre acte *titre de terres* au lieu de *droits immobiliers*.

Nous pouvons donc avoir recours aux décisions rendus par notre Cour sur notre s.s. C de notre article 46 pour interpréter l'article 68 du Code de Procédure Civile.

Il s'agit de savoir si la matière en litige c'est-à-dire la validité du règlement limitant l'impôt à $200 par année sur les terrains de l'appelante affecte les droits futurs des parties.

Il y a un grand nombre de cas concernant les taxes municipales où le montant en litige serait moindre de $2,000 mais dont la décision aurait un effet direct et immédiat sur les prélevés faits à l'avenir et alors on peut dire que les droits futurs des parties seraint affectés; mais cette Cour en considérant cette classe de causes a dans ses premiers jugements donné à la loi une interprétation libérale: *St. Gabriel* v. *Soeurs de la Congrégation*, 12 S. C. R. 45; *Wylie* v. *Montreal*, 12 S. C. R. 384; *Reburn* v. *Ste Anne*, 15 S. C. R. 92; *St. Sulpice* v. *Montreal*, 16 S. C. R. 399. Appendix C.11

Mais dans ces dernières années on a refusé l'appel: *Dubois* v. *Ste. Rose*, 21 S. C. R. p. 65; *Tousignant* v. *Nicolet*, 32 S. C. R. p. 353; *Montreal* v. *Land Company*, 34 S. C. R. p 270; *Outremont* v. *Joyce*, 43 S. C. R. p. 611.

En donnant effet à ces dernières décisions je dois venir à la conclusion que nous n'avons pas juridiction.

La motion doit être accordée avec dépens.

Idington, J.—I concur.

APPENDIX C. 11.

King Edward Hotel Company v. City of Toronto, March 7, 1917.

The Registrar.—This is an application to affirm the jurisdiction of the Court. The jurisdiction is claimed under section 41 of the Supreme Court Act. It is admitted that the appeal involves the assessment of property at a value of not less than $10,000. The usual procedure on appeals in assessment cases was followed in this instance.

The King Edward Hotel Co. was assessed for the sum of $296,692 in respect of a business assessment, and appealed therefrom to the Court of Revision for the City of Toronto. This appeal was heard in October, 1916, when the Court of Revision decided that the Hotel Company was not liable for business assessment, and directed that such assessment should be struck off. The city then appealed to the County Judge, who on 11th December, 1916, restored the business assessment. The Hotel Company then appealed to the Ontario Railway and Municipal Board, pursuant to the provisions of the Assessment Act, R. S. O. 1914, c. 195, s. 80, which Board upheld the decision of the County Judge. Sub-section 6 of the said section 80 provides as follows:—

Appendix C.11

"An appeal shall lie from the decision of the Board under this section to a Divisional Court upon all questions of law, but such appeal shall not lie unless leave to appeal is given by the said Court upon application of any party and upon hearing the parties and the Board."

The Hotel Company moved before the Supreme Court of Ontario for leave to appeal under the above sub-section, and judgment was pronounced on the 7th February, 1917, refusing leave and dismissing the application on the ground that in another case before it in an appeal from a Judge of the County Court of Essex, the Court had decided that hotels such as the King Edward were liable for business assessments. The Hotel Company now applies to me under Rule 1 of the Supreme Court Rules for an order affirming the jurisdiction of this Court.

I have already been called upon to deal with a somewhat similar motion in the case of *Grierson* v. *Edmonton*, now standing for judgment in this Court. In that case the charter of the City of Edmonton, Statutes of Alberta, 1913, c. 23, s. 347, s.-s. 12 provides that the judgment of a Judge of a District Court of the Judicial District of Edmonton shall be final and conclusive in assessment appeals and could only be appealed from by a unanimous vote of the council, and this excluded an appeal, which under the provisions of the statutes of the province lay to the Supreme Court of that province, from the judgment of the District Court Judge, except with the unanimous vote of the Municipal Council, and which in that case the council refused to give. On a motion to affirm the jurisdiction of the Supreme Court I held that the decision of the District Court Judge of Edmonton was a judgment in that case of a Court of last resort within the meaning of section 41 of the Supreme Court Act. In the argument before the Supreme Court no objection was taken to its jurisdiction.

The fact that a further appeal would lie in these cases, if leave were obtained from some outside authority, in the Alberta case the municipal council, in Ontario the Supreme Court of the province,—does not in my opinon prevent the decision of the District Judge in the one case and the Ontario Railway and Municipal Board in the other, being nevertheless the Court of last resort within section 41 of the Supreme Court Act. To hold otherwise would be to say that the provinces may by suitable legislation prevent an appeal to the Supreme Court in the face of Dominion legislation, expressly enacted for the purpose

of conferring jurisdiction, something that the Judicial Committee has held cannot be done. *Vide Crown Grain Co. v. Day* (1908), A. C. 504. Appendix C.12

The motion to affirm the jurisdiction is granted, costs in the cause.

APPENDIX C. 12.

Hudson Bay Co. v. Swift Current, June 8, 1917.

The Registrar.—This is a motion to allow security. Chrysler, K.C., for the motion. No one contra, although an affidavit of service of notice of motion has been filed. $500 has been paid into Court, so that if there is jurisdiction to hear the appeal, the motion should be granted. The application is made under section 41 of the Supreme Court Act, which provides as follows:—

"An appeal shall lie to the Supreme Court from the judgment of any Court of last resort created under provisional legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such Court is or are by provincial or municipal authority authorized to adjudicate, and the judgment appealed from involves the assessment of property at a value of not less than ten thousand dollars."

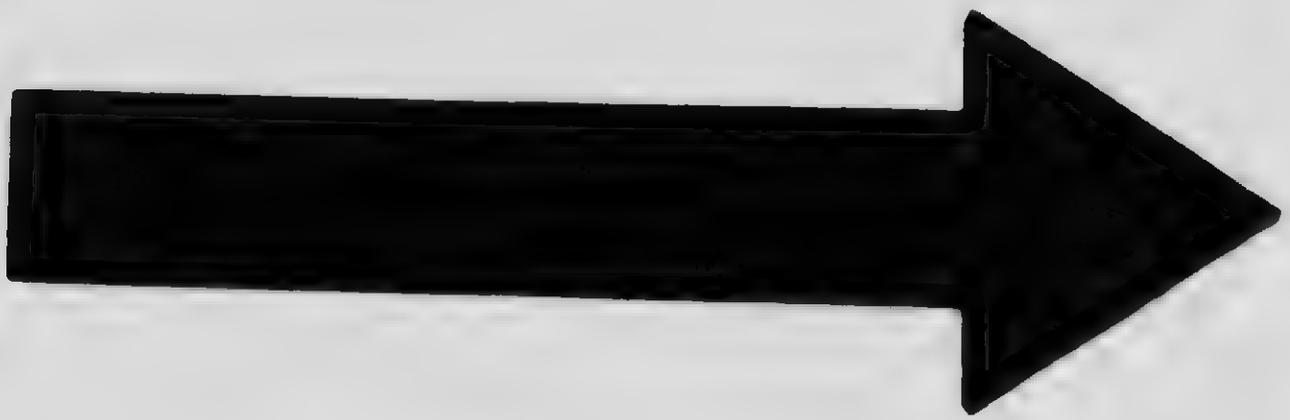
The material filed shows that the lands in question, about 100 acres, were assessed at $350 an acre, which was confirmed by the Court of Revision, but reduced to $250 an acre by the Local Government Board, and therefore involves an assessment for a sum far beyond the amount required to give jurisdiction under the above section.

The statutes affecting the appeal are the City Act of Saskatchewan, contained in the statutes of 1915; c. 16, s. 394, etc., which give jurisdiction to the Court of Revision, and from its decision an appeal is given to the Local Government Board under section 414. By section 415, sub-section 15, the decision of the Local Government Board is declared to be final. The Local Government Board is constituted by the Local Government Board Act, 1913, Statutes of Sask. c. 41. There would appear to be no doubt that the decision of this Board is the decision of a "Court of last resort," within the meaning of that expression in section 41.

The decision in *Pearce* v. *Calgary*, 53 S. C. R. p. 1, has been followed by me in a number of other cases from the Western Provinces.

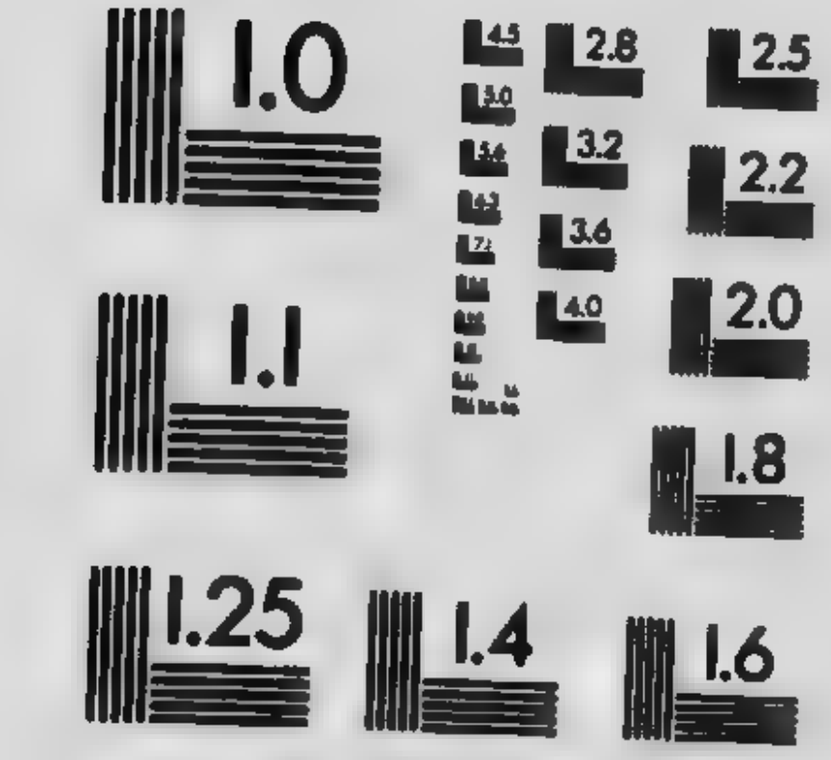
The application is granted with costs in the cause.

Followed in *Rogers* v. *Swift Current*, 57 Can. S. C. R. 534.



MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

Appendix C.13

APPENDIX C. 13.

Geracimo v. Joubert, February 19, 1917.

The Chief Justice.—Motion to quash for want of jurisdiction. This action was brought by the plaintiff Joubert, an author, to recover $1,840 with double costs, including costs of exhibits, $119.25. The action arose through the presentation by the defendants at a Montreal theatre of certain French comedies. The plea is a general denial. The trial Judge held that the action could only be brought by a society of French lyric authors, of which the plaintiff was a member, which had a regulation to this effect binding on its members, and dismissed the plaintiff's action.

The Court of Apeal reversed this judgment, holding that the case was governed by the Convention of Berne, which gave a right of action to the author, and thereupon pronounced judgment in his favor for $217.

I do not see where the jurisdiction of this Court lies. The demand is exclusively in damages for an amount less than $2,000. The conclusions of the declaration are that the defendants be condemned jointly and severally to pay the plaintiff the sum of $1,840, and double costs, including costs of exhibits filed in this case, which amount to $119.25.

I cannot find that on the pleadings any question is raised which involves the validity of an Act of the Parliament of Canada or of the legislature of any of the provinces of Canada. The application of chapter 70 of the Revised Statutes of Canada to the facts in issue is discussed by the Judges, but the validity of that legislation is not questioned.

The motion should be granted with costs.

Idington, J.—The amount in controversy does not seem to entitle the appellant to bring his case here, though possibly the question raised therein may be much more important to have determined than what is involved in many cases getting here. And hence I think the appeal must be quashed with costs.

Anglin, J.—I concur.

Brodeur, J.—Nous sommes appelés à décider si nous avons juridiction pour entendre cette cause.

Le montant de la demande n'est que de $1,800 et n'est pas encore élevé, par conséquent, pour nous donner juridiction (Art. 46-C de l'Acte de la Cour Suprême).

Mais l'appelant allègue que l'affa re en litige implique la question de la validité d'une loi du Parlement du Canada et qu'en vertu de l'article 46a appel peut être interjeté ici. Appendix C.14

Je ne vois rien dans les plaidoiries qui supporte cette allégation.

La cause est pour infraction de la loi des droits d'auteur. On reproche aux défendeurs d'avoir représenté des pièces de theâtre sans l'autorisation voulue et on se base évidement sur le statut impérial de 1833 appelé "Dramatic Copyright Act" (3 & 4 W. 4, c. 15). L'Intimé prétend que ce statut impérial a force de loi au Canada, du moins quant à la partie qui concerne les représentations théatrales. Notre loi Canadienne sur les droits d'auteur ne parle pas de ces représentations et alors il s'agit de savoir si cette disposition du statut impérial était encore en force ici.

La cause ne soulève donc pas la constitutionalité d'aucune loi du Parlement du Canada, car le Parlement du Canada n'a jamais légiféré sur le droit de représenter des pièces de theâtre. Mais les tribunaux ont à décider si le statut impérial, sous ce rapport, a force de loi ici.

Dans ces circonstances, l'article 46 (*a*) ne peut pas être invoqué par l'appelant pour lui permettre d'interjeter appel devant cette Cour.

L'appel doit être cassé et la motion de l'intimé doit être accordée avec dépens.

APPENDIX C. 14.

Weiss v. Silverman, February 4, 1919.

The Registrar.—This is a motion to affirm the jurisdiction of the Court. Mr. Weinfield, for motion; no one contra.

The facts of this case appear to be as follows:—

In an action brought in the Superior Court in the District of Montreal by J. Watterman & Co., plaintiff, against J. Shpritser & Gerson Zudich, defendants. The defendants made an abandonment of their property, which consisted mainly of certain real estate in the City of Montreal. The creditors' claims filed amount to some $80,000. The defendant is a creditor of the insolvents for some $10,000, by virtue of a loan secured by mortgage. The respondent is a contractor, who undertook to do certain plumbing work for the insolvents in an apartment house built upon the lands covered by the plaintiff's mortgage. The property in question was sold by the sheriff

Appendix C.14

for something over $37,000. There is a first mortgage undisputed of $20,000, which has priority over that of the plaintiff. The dispute in the present action is between the plaintiff Weiss and the contractor Silverman. The plaintiff alleging the work done by the defendant was not of the value claimed by him, and also that the defendant had renounced his privilege against the immovable property. The insolvency proceedings before the prothonotary remain stayed pending an adjudication of the present issue. As there is not sufficient balance in his hands to satisfy both claims the plaintiff, instead of having the dispute settled in the proceedings before the prothonotary, has contested his claim by the present action, which he appears to have the right to do under Art. 777 C. C. P. After setting out the facts in his declaration he prays that the alleged privilege of the defendant be declared null and void and its registration radiated, cancelled and annulled, and that the prothonotary be ordered not to collocate defendant as a privileged creditor. The action was tried by the Honorable Mr. Justice Guerin, who held that the plaintiff had failed to establish his claim, and dismissed the action with costs. An appeal was then taken to the Court of King's Bench, which confirmed the judgment of the Court below. The plaintiff now desires to appeal to the Supreme Court of Canada.

The motion to affirm is based on two grounds: 1st, That the case falls within section 46, sub-section (*c*) of the Supreme Court Act, namely, that the matter in controversy amounts to the sum or value of $2,000; and 2nd, that the case also falls within section 46, sub-section (*b*), as the matter in controversy relates to "title to lands or tenements, annual rents, and other matters or things where rights in future might be bound." The declaration contains no demand for a specific sum of money although it is clear that there is very much more than $2,000 involved in the dispute between the parties, the plaintiff's claim being $10,000 odd and the defendant's over $7,000; the total sum to be distributed is only $10,000. In *Shawinigan* v. *Shawinigan*, 13 S. C. R. 650, it was held by a majority of the Court that an action to set aside a by-law of a municipal corporation, which involved the purchase of an electric plant for $40,000, was substantially an action to prevent the consummation of a contract for the sale of property exceeding $2,000.

Were it not for the recent decision in the case of *Montarville Land Co.* v. *Economic Realty Co.*, 54 S. C. R. 140, I would have had a little hesitation in affirming the jurisdiction of the

Court. That was a case in which the facts were shortly as follows: The plaintiffs the Economic Realty Co., brought an action against the defendants, the Montarville Land Co., in which they alleged that they were purchasers of two lots from the latter company, and still owed part of the purchase price; they then alleged that the lands in question were subject to certain hypothecs which it was the duty of the vendors to remove and which burdened the lots purchased by them to the amount of $3,333, and they asked the Court to order the defendants to remove from the registry the hypothecs in question and further that the plaintiff should not be called upon to pay the balance of the purchase money so long as defendants neglected to remove the hypothecs. The defence was that the documents which the plaintiff alleged to be clouds on his title were not so, and had no effect, and this contention of the defendant was maintained by the Court of first instance, but the decision was reversed on appeal by the Court of King's Bench. The plaintiff sought to appeal to the Supreme Court, where it was held that no amount was demanded in the action and the matter in controversy did not come within section 46, sub-section (*b*) or sub-section (*c*), the Court saying "that the only question in dispute is as to the fulfilment of the vendor's obligation to deliver to the respondent their property free from a mortgage." Although with considerable hesitation, I am of the opinion t' the present case is distinguishable from *Montarville Land* c . v. *Economic Realty Co.*, in that there is a matter in controversy between the parties amounting to over $2,000, and it is to reach that money in the hands of the prothonotary to satisfy his claim that the present action of the plaintiff is brought. The former case presented no such feature. There is no doubt that in the declaratory character of the relief demanded in this case there is much similarity with the facts which are found in the earlier case, but on the whole I am disposed to find a sufficient distinction between the cases for the reasons above set out, to decide that the Court has jurisdiction to hear the appeal. Appendix C.14

The appellant understands that he must assume the risk of the Court, at the hearing, holding that I am wrong, and that the appeal should be quashed for want of jurisdiction, as the view whi' above expressed is not in any way binding upon the Court

Motion . llowed, costs with the cause.

The appeal was subsequently heard on its merits, no further question of jurisdiction being raised.

Appendix C.15

APPENDIX C. 15.

Bisaillon v. City of Montreal. December 11, 1916.

The Chief Justice.—This is a motion to quash for want of jurisdiction. The action was brought by the present appellant to annul a resolution accompanied by an interlocutory injunction to restrain the City of Montreal from proceeding to expropriate lands under the following circumstances.

By 2 G. V. c. 56, s. 33, the city was authorized to acquire by expropriation or private purchase, lands for the purpose of prolonging Boulevard St. Joseph. Pursuant to this statute the city gave the plaintiff notice of expropriation affecting twelve lots. The city offered $17,000 as compensation, which was refused, and arbitrators were appointed. Before an award was made, the city passed a resolution to desist from the expropriation all the lands of the plaintiff, and decided to expropriate only four out of the twelve lots. The plaintiff claims that this resolution was illegal; that the statute in question required that the expropriation should take place within twelve months according to a plan of Barlow; that the defendants had not expropriated according to Barlow's plan; that the defendants had no power now to amend Barlow's plan and to take the new lots as the delay of twelve months had expired.

In his demand the plaintiff concludes by asking to have it declared that the subsequent resolution which professed to order désistement from the arbitration originally ordered, should be declared illegal and *ultra vires*, and that the interlocutory injunction which had been granted to that effect should be made perpetual.

Mr. Justice Guerin gave judgment for the plaintiff holding that the last resolution was illegal, and he made the injunction perpetual, on the ground that the proceedings to reduce the area to be expropriated had not been taken within twelve months.

This judgment was reversed by the Court of Appeal, which held that the resolution reducing the number of lots required, which was simply an amendment to the original proceedings, could be passed after a delay of twelve months, and quashed the injunction and dismissed the plaintiff's action with costs.

It was assumed that this is a case which is governed by *Price* v. *Tanguay*, 42 S. C. R. 133, where it is held that no question of future rights or title to property was involved within the provisions of section 46 of the Supreme Court Act.

But the conclusions of the declarations ask that the resolution purporting to amend the by-law be declared illegal, and

the injunction is merely an ancillary proceeding intended to prevent action by the arbitrators until such time as the validity of that resolution is determined. Appendix C.15

I am disposed to think that we have jurisdiction: *Murray* v. *Westmount*, 27 S. C. R. 579.

See sub-section 45 (*e*) and 47 of the Supreme Court Act.

Anglin, J.—This case appears to me to fall within the principle of the decision in *Murray* v. *Town of Westmount*, 27 S. C. R. 579, which, so far as I am aware, stands unquestioned.

Brodeur, J. — Par son action la demanderesse appelante demande 1° que la résolution de conseil municipal de l'intimée adopté le 22 décembre, 1913, par laquelle elle déclarait qu'elle s'en tenait à l'expropriation de quatre lots de terre appartenant à l'intimé et qu'elle se désistait de l'expropriation de huit autres lots soit déclarée illégale;

2° que le désistement signifié par la défendéresse intimée soit déclaré illegal;

3° que "l'injonction interlocutoire injoignant à la défenderesse de ne pas procéder à l'expropriation de l'immeuble de la défenderesse conformément au dit avis d'expropriation du mois de janvier, 1914, soit confirmée et déclarée absolue et permanente."

La question qui se présente est de savoir si le Cité de Montreal est tenue d'exproprier les douze lots pour lesquels elle avait d'abord donné avis d'expropriation en juin, 1913; ou bien si elle avait le droit de se désister de cet avis et de restreindre son droit d'expropriation à quatre lots seulement.

Le Cité de Montréal prétend avoir le droit de ne prendre que quatre lots tandis que le propriétaire déclare, au contraire, qu'en vertu de l'acte 2 G. V. c. 56, s. 33 elle est tenue d'acquérir à l'amiable ou d'exproprier les 12 lots en question.

Le Cour Supérieure a donné raison au propriétaire et a maintenu son action, mais ce jugement a été renversé par le Cour d'Appel. Le propriétaire interjette appel devant cette Cour de cette dernière décision et la Cité de Montréal en demande le renvoi parceque, dit-elle, nous n'avons pas juridiction.

S'il ne s'agissait que de la validité de la résolution mentionnée dans les conclusions de l'action, il n'y a pas de doute que nous n'aurions pas juridiction. Il en serait de même du désistement dont il est aussi fait mention dans les conclusions de la declaration; mais la demanderesse demande en outre par

Appendix C.15 ses conclusions qu'il soit enjoint à la Cité de Montréal de ne pas proceder à l'expropriation des quatre lots de terre appartenant à, la demanderesse.

Cette dernière nie à la Cité de Montreal le droit de prendre ces quatre lots de terre. Et elle adjoute que si elle veut les prendre elle est obligée alors d'exproprier tous les douze lots.

La qustion est donc de savoir si la Cité de Montréal peut exercer son droit d'expropriation sur quatre lots seulement; ou bien si la Législature ne lui impose pas l'obligation de prendre les douze lots.

C'est un "title de terres ou tenements" qu'elle qu'elle invoque et la demanderesse appelante le lui nie.

Je considère que cette dernière avait le droit dans les circonstances d'appeler à cette Cour sous les dispositions de l'art 46 S.s, C. parcequ'il s'agit de titres de terres. On veut enlever à la demanderesse quatre lots de terre et cette dernière s'y objecte en disant: Vous ne pouvez, en vertu de la loi qui autorise l'expropriation ne prendre que ces quatre lots. Vous ne pouvez pas m'en déposseder par les procédures que vous avez instituées.

La demanderesse est dans la situation de cette personne qui aurait vendu douze lots à un acheteur et ce dernier ne voulant prendre que quatre lots se trouverait poursuivi par le vendeur pour l'empêçher de prendre posession de ces quatres lots.

Il me semble qu'alors le titre des terres sérait en litige C'est le cas qui nous occupe.

L'Intimé a cité au soutient de sa motion les causes suivantes: *Quebec, Montmorency Rly. Co.* v. *Mathieu,* 19 S. C. R. 426; *Emerald Phosphate Co.* v. *Anglo-Continental Guano Work* 21 S. C. R. 422; *Came* v. *The Consolidated Car Heating Co.,* 11 R. J. Q. (B.R.) 114; *Toussignant* v. *Nicolet,* 32 S. C. R. 353; *Delisle* v *Arcand,* 36 S. C. R. 25; *Price* v. *Tanguay,* 42 S. C. R. 133.

Dans la cause de *Quebec Montmorency Rly. Co.* v. *Mathieu,* il s'agissait d'une expropriation de chemin de fer et de la validité de la nomination d'un arbitre. Il y a eu une question de soulevée si cette cause pouvait être susceptible de venir devant la Cour Suprême; mais il ne parait pas y avoir de décision sur ce point.

Dans la cause de *Emerala Phosphate* v *Anglo-Continental Guano Works,* il s'agissait d'un bref d'injonction au sujet d'un empiètement sur un terrain voisin. Il avait été décidé par les tribunaux inférieurs qu'on aurait du procéder par action en bornage et le Cour Suprême a décidé "that as the matter in

controversy did not put in issue any title to land where the rights in future might be bound the case was not appealable." Appendix C.15

L'Honorable Juge Taschereau, qui a rendu le jugement, disait: "Now under the laws of the province the rights to the title to this land or to the possession thereof could not be determined on such a proceeding taken *ab initio*; no judgment either au possessoir au au pétitoire could be given thereon, as well held by the Court of Appeal."

Ce jugement a été rendu avant l'amendment 56 V. c. 29, s. 1, et à cet époque les questions de servitude comme le bornage, n'étaient pas généralement considérées comme donnant lieu à un droit d'appel. (*Bureberg* v. *Hampson*, 19 S. C. R. p. 369, 1891).

Dans la cause de *Came* v. *The Consolidated Car Heating Co.*, 11 R. J. Q. (B.R.) 114, nous avons un jugement de la Cour d'Appel à Quebec. Il s'agissait de déterminer, dans cette cause s'il avait appel au Conseil Privé et, comme il ne s'agissait que d'un bref d'injonction pour empêcher la contre-façon d'une patente, il a été décide qu'l n'y avait pas d'appel au Conseil Privé.

La cause de *Toussignant* v. *Nicolet*, a été aussi invoquée par l'intimée. Dans cette cause il avait été décidé que sur une action pour annuler un procès-verbal établissant un chemin, nous n'avions par jurisdiction, même si l'effet du procès verbal pouvait amener une dépense de plus de deux mille dollars ($2.000) affectant les propriétés de l'appelant. Le principe qui a été énoncé dans cette cause est que: "neither the collateral effects nor any contingent loss that a party may suffer by reason of a judgment are to be taken into consideration . . ."

Dans la cause de *Délisle* v. *Arcand* il a été décidé, vu qu'il s'agissait d'une action possessoire, que le titre de terres pouvait être invoqué et que nous avions jurisdiction.

L'intimée a cité en outre la cause de *Price* v. *Tanguay*, 42 S. C. R. 133, où l'appel a été cassé sur le principe que le droit de flotter des billots sur une rivière ne constituait pas une servitude et ne conférait pas un droit exclusif de propriété au sujet duquel une action possessoire pourrait être instituée.

Aucun de ces jugements invoqués par l'intimée ne décide carrément le point qui se soulève dans la présente cause.

D'un autre coté l'appelant a invoqué la cause de *Murray* v. *Westmount*, 27 S. C. R. 578 (1897), où il a été décidé ceci: "In an action to quash a by-law passed for the expropriation of land, the controversy relates to a title to land, and an appeal

Appendix C.16 lies to the Supreme Court of Canada, although the amount in controversy is less than $2,000."

Dans cette lernière cause le Ville de Westmount avait passé un reglement pour l'élargissement d'une rue et Murray, dont la propriété était riveraine, a pris une action pour annuler le règlement et L'Honorable Juge Taschereau en rendant jugement a dit: "The controversy relates to a title to land, and the case is therefore appealable."

Cette cause de Murray et de la Ville de Westmount me paraît être absolument semblable à la prèsente cause.

Je pourrais citer aussi la cause de *Shawinigan* v. *Shawinigan*, 43 S. C. R. p. 650, ou il s'agissait d'un bref d'injonction et de la validité d'un règlement pour empêcher l'achat de certaines propriétés. La majorité de la Cour a décidé que l'action avait pour but d'empêcher l'exécution d'un contrat de plus de $2,000 et que la Cour avait juridiction.

Dans une autre cause décidée par cette Cour *Lefeuntun* v. *Véronneau*, 22 S. C. R. p. 203, il s'agissait d'une requête en nullité de décrêt et il a été décidé que nous avions juridiction.

Me basant sur ces dernières décisions je considère que nous avons juridiction.

La motion pour renvoyer l'appel doit donc être rejetée avec dépens.

Idington, J., I concur.

APPENDIX C. 16.

Township of Euphrasia v. Township of St. Vincent, May 25, 1910.

The Registrar.—

Rainey, K.C., for motion.

Mason, contra.

This is an application under Rule 1 to affirm the jurisdiction of this Court to hear the appeal.

The statement of claim of plaintiff (appellant), stated shortly, alleges that there was a road allowance forming the boundary between plaintiff and defendant, but owing to physical difficulties and obstructions it became necessary many years ago to deviate the boundary line opposite lot 1 in the 10th concession of the Township of St. Vincent, and thereafter the said road was carried through certain lots in the 10th, 11th and 12th concessions of the Township of Euphrasia; the said devia-

tion terminating at the road allowance between the townships of Holland and Euphrasia. The plaintiffs further allege that they had been put to expense in the maintenance of the said boundary road where the same had been diverted as aforesaid, and that the defendants had refused to bear any portion of the expense of maintaining and repairing the same. The plaintiffs conclude their pleadings by claiming a specific sum of $721.74, being one-half the amount expended in maintaining and repairing the highway where the deviation occurred between 1891 and 1914, and an order of the Court declaring:— Appendix C.16

"That under section 458 of the Municipal Act, Revised Statutes of Ontario, 1914, the said roadway in use, mentioned in paragraph 4 thereof, is a deviation of the boundary line or road allowance between the townships of St. Vincent and Euphrasia within the meaning of section 458 of the Municipal Act"; and

"That the said defendant corporation of St. Vincent is equally with the said plaintiff corporation responsible for the maintenance and repair of the said road."

The action was tried by Mr. Justice Clute, who gave judgment in favor of the plaintiff, O. W. N. Vol. 9, p. 273. The trial Judge held that the road in question was a deviation within the meaning of the statute, and that the defendant corporation was responsible with the plaintiff corporation for its maintenance. This judgment was reversed by the Appellate Division, 10 O. W. N. p. 21.

The defendant now desires to appeal to the Supreme Court of Canada, and the question for my determination is: "Does the case fall within section 48 of the Supreme Court Act"?

This is a final judgment of the highest Court of last resort in the province, and the case is therefore appealable to the Supreme Court under section 37, if it also falls within the provisions of section 48, which negatives an appeal unless the title to real estate or some interest therein is in question. Section 48 (*a*), or under one of the following sub-sections:—

48 (*c*).—The matter in controversy in the appeal exceeds the sum or value of one thousand dollars, exclusive of costs.

48 (*d*).—The matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights.

Mr. Rainey, in addition to his contention that the appeal falls within section 48 (*a*), also argued that it falls within the provisions of 48 (*d*).

Appendix C. 16

The amount in controversy is under $1,000, and therefore no assistance is obtained from 48 (*c*). I have doubts if 48 (*d*) has any application, but I am so strongly of opinion that the case falls within 48 (*a*) that I do not deem it necessary to consider that aspect of the question.

The Municipal Act, R. S. O. c. 192, provides by section 433 that the "soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this Act."

And the jurisdiction over road allowances which form township boundaries is provided for by section 439, which says that "the councils of the local municipalities . . . shall have joint jurisdiction over all boundary lines."

Section 432 provides that all highways . . . and all alterations and deviations therefrom shall be common and public highways.

Section 468 provides that where on account of physical difficulties or obstructions existing on the boundary line between municipalities, a road is laid out deviating from the original road allowance so as to lie wholly within one municipality, such road shall be deemed to be the boundary line between the municipalities.

It seems clear to me that applying the above sections of the Municipal Act to the facts of this case, and the conclusions mentioned in the statement of claim, there can be no question whatever that there is involved in this appeal a question of title to real estate or some interest therein.

The plaintiffs allege that there has been established by the deviation a new boundary. If they are right as to this, then by virtue of the statute the ownership of the land forming the said deviation is vested in the joint municipalities. The defendants deny this, and claim that the facts do not warrant the Court in holding that there has been a new road substituted for the original road allowance. I do not think that the ownership of the land is a matter collateral to the dispute respecting the deviation so as to be covered by the case of *Toussignant* v. *Nicolet*, 32 S. C. R. 352, and similar cases. I do not see that because the defendants are repudiating rather than claiming an interest in the land, it alters the matter in any respect. The substantial question between the parties is whether or not there has been a deviation, whereby they have become joint owners of the deviated road, and this surely falls within the provisions of section 48 (*a*).

I think the motion to affirm jurisdiction should be allowed with costs to the plaintiffs in the cause. Appendix C. 17

APPENDIX C. 17.

Foster v. Township of St. Joseph, Oct. 15, 1917.

The Registrar.—This is a motion made under Rule 1 to affirm the jurisdiction of the Court. W. L. Scott, for the motion. Ebbs, contra.

The writ of summons is endorsed with the plaintiff's claim which is "to set aside the assessment of the year 1916 of (description of lands), in so far as the said assessment values or includes the buildings, plants and machinery on the said lands and to restrain a tax sale of certain goods and chattels . . . and for an injunction and for damages."

It is admitted that the amount of the taxes is less than $200. The jurisdiction is not claimed under section 41, presumably because the appeal is not taken from the judgment of any Court of last resort created under provincial legislation to adjudicate concerning assessment of property, etc. Instead of appealing from the assessment, the plaintiff brought an action in a High Court claiming the above relief. He applied for and obtained an injunction from the Judge of the County Court, but his motion to continue the injunction subsequently made to the Hon. Mr. Justice Latchford, was refused, and the action dismissed. An appeal taken to the Appellate Division was dismissed. The plaintiff now desires to appeal to the Supreme Court of Canada.

Mr. Scott contends that the cases in the province of Quebec respecting taxes, rates and assessments collected on p. 239 *et seq.* of Cameron's Supreme Court Practice, are applicable.

I do not agree with his contention.

Section 46 (*b*), which deals with appeals from the Province of Quebec, has been frequently interpreted by the Court, and according to our jurisprudence the words "fee of office, duty, rent, revenue" are governed by the words "payable to His Majesty," and this part of the sub-section relates solely to appeals in cases of claims by the Crown. See *O'Dell* v. *Gregory*, 24 S. C. R. 661, and *Bank of Toronto* v. *Le Curé*, 12 S. C. R. 31. *Vide* also Cameron's Supreme Court Practice, pp. 211 and 212.

In the cases from Quebec relating to taxes, rates and assessments where the Court has heard the appeal, the Court's jurisdiction has been founded upon the view that these cases fell

Appendix C.18 under the latter part of sub-section (*b*), viz., "other matters or things *ejusdem generis* with title to lands where rights in future might be bound": *Gilbert* v. *Gilman*, 16 S. C. R. 189.

If we turn now to the corresponding sub-section of section 48, which deals with appeals from the Province of Ontario, we find that the provisions of sub-section (*b*) are there contained—so far as they are contained at all—in sub-section (*a*) and sub-section (*d*). Sub-section (*d*) can be eliminated from our consideration in view of the decisions in *O'Dell* v. *Gregory* and *Bank of Toronto* v. *Le Curé*, above mentioned, while sub-section (*a*) does not go so far as the corresponding sub-section of 46. It does not extend to "other matters and things *ejusdem generis* with title to lands where rights in future might be bound."

If I am right in my conclusion that the jurisdiction exercised by the Courts in Quebec cases dealing with taxes, rates and assessments has been founded upon the words of section 46, sub-section (*b*), "other matters and things where rights in future might be bound," and there being no similar words in section 48 relating to Ontario appeals, then I must hold that there is no appeal in this case. I further think that the decision of this Court in *Hamilton* v. *Hamilton Distillery Co.*, 38 S. C. R. 239, is in point and governs this case. That was an action in which the plaintiff asked for a declaration that certain municipal by-laws were unauthorized, illegal and invalid and an injunction. The Court held that there was no jurisdiction.

The motion must be refused with costs.

Appeal to the Court dismissed with costs.

APPENDIX C. 18.

Rowan v. Toronto Railway, June, 1918.

Idington, J.—This application to amend the judgment given by this Court twenty-one years ago so as to enable a recovery of interest, which was neither given by the record nor yet expressed by the reasons assigned in support of the judgment by the learned Judges who have passed away, should not be entertained.

Neither should the motion for leave to appeal from the Court of Appeal for Ontario, which refused to allow the claim for interest, be acceded to.

The application should be dismissed with costs.

Anglin, J.—The purpose of this motion is to enable the plaintiff to recover $251.25, interest on what he contends was a verdict in his favor for $1,500 from the 6th of April, 1897, when it was rendered, to the 3rd of Oct., 1899, when judgment was first given for him by this Court, which reversed the judgment of the Court of Appeal for Ontario affirming that of the trial Judge (30th of June, 1897), dismissing the action. The plaintiff seeks primarily an order to vary the certificate of the judgment of this Court by inserting therein a provision directing that he shall be allowed the interest in question, and, alternatively, leave to appeal from a judgment of the Appellate Division rendered on the 6th of May, 1918, affirming a judgment of Middleton, J. (30th of April, 1918), who held him not entitled to the interest in question upon the record as it stands. Appendix C.18

The application before Middleton, J., was a renewal of a motion originally launched by the defendants in January, 1900, before the present Chief Justice of Ontario, then Chief Justice of the Common Pleas, to vary minutes of judgment settled by the judgment clerk of the High Court under the judgment of this Court, whereby he allowed the plaintiff the interest in dispute. The learned Chief Justice, it is said, was of the opinion that the minutes had been wrongly settled in this respect, but reserved judgment to allow the plaintiff to apply to this Court to vary the certificate of its judgment by inserting therein a provision for such interest. A motion for this relief was heard by the Registrar of this Court and dismissed on the 30th of January, 1901. No appeal was taken from the Registrar's order. The motion before the Chief Justice was never disposed of by him, it is alleged, because of negotiations and arrangements between counsel. His translation to the Court of Appeal prevented his dealing with it after the lapse of six weeks from the happening of that event. Hence the renewal of the motion before Middleton, J., seventeen years after it had been launched.

So far as the plaintiff seeks a variation of the certificate of this Court, even if not debarred by the unappealed order made by the Registrar in 1901, refusing it, his application is hopeless. The reasons for judgment delivered here in 1899 (29 Can. S. C. R. 717), are silent as to interest and contain nothing to shew an intention to give the plaintiff any relief other or greater than the law of the province would entitle him to upon a simple reversal of the judgment dismissing his action, and a direction for the entry of judgment in his favor for $1,500. Nineteen years have elapsed since this Court rendered its judgment,

Appendix C.18

and every member of it, as it was then constituted, is now dead. Under these circumstances any variation of the certificate on the ground that it did not truly express the intention of the Court—the only possible justification for amending it—is obviously out of the question.

The application for special leave to appeal from the judgment of the Appellate Division is equally hopeless. Such leave is never given unless there appears to be some reason to question the correctness of the judgment from which it is sought to appeal.

There is, in my opinion, no ground whatever for doubting that the answers of a jury to questions obtained under section 112 of the Ontario Judicature Act (R. S. O. 1897, c. 51), were not a verdict. In this case the trial Judge directed the jury to answer questions. It was not directed to return a verdict—general or special. It did answer the questions. It did not make any finding either for the plaintiff or for the defendant. There was, therefore, no general verdict. Since the Judicature Acts, special verdicts, unless in extraordinary cases, may be regarded as anachronisms, and are practically obsolete. The peculiar practice in regard to taking and settling a special verdict will be found in Chitty's Archbold, 14th ed., p. 657. No attempt was made to follow that practice, undoubtedly because neither Judge, counsel nor jurors had in mind the rendering of such a verdict. They were concerned only with the answers to the questions submitted under section 112. Moreover, I doubt whether the findings of the jury, without intendments or inferences which the Court could not make in aid of a special verdict (*Downman* v. *Williams*, 7 Q. B. 103, 108-9), cover all the facts necessary to support a judgment for the plaintiff. I am perfectly clear, however, that the finding made, never having been intended either by the Court, the jury or the parties to constitute a special verdict, there would be no justification for so treating them.

It may possibly be that, where not forbidden to do so by the trial Judge, or told in explicit terms that they are to answer the questions submitted *instead of* rendering *any* verdict, the jury might have added to their answers a general verdict for the plaintiff. In my opinion, however, the rendering of such a verdict would have been contrary to the spirit, if not to the letter, of section 112. But the fact is that the jury confined themselves to answering questions submitted under that section, and neither made any general finding for either party, nor intended to render a special verdict. The statute makes it too

plain for argument that such answers are not a verdict. "The jury shall answer such questions and shall not give any verdict." Appendix C.18

Section 116 of the Judicature Act (R. S. O. 1897, c. 51), enacted that:—

"Unless it is otherwise ordered by the Court a verdict or dgment shall bear interest from the time of the rendering the verdict or of giving the judgment, as the case may be . . . "

The plaintiff had neither a verdict nor a judgment until this Court gave judgment in his favor on the 30th of October, 1899. That judgment was that the plaintiff should recover $1,500. It contains nothing to indicate that that recovery was to be as of any date other than that of the judgment awarding it.

Apart from all considerations arising from delay, and the comparative insignificance of the amount involved, the plaintiffs application utterly fails, and should be dismissed with costs.

Brodeur, J.—I have come to the conclusion that this motion should be dismissed with costs.

By section 112 of the Judicature Act of Ontario of 1897, it is declared that on a trial by a jury the Judge instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by him, and the jury shall answer such questions, and shall not give any verdict; and on the finding of the jury upon the questions which they answer, the Judge may direct judgment to be entered.

In this case a jury trial took place. Some questions were submitted by the Judge to them. Those questions might cover all the facts, or most of the facts, which had to be inquired into; but all the same they were simply questions which the jury was directed to answer.

The case relates to an accident, and the jury were asked whether the defendant was negligent or not. There was an issue raised as to whether the defendant was guilty of contributory negligence, and a question was put to the jury on that last issue. Their answer, however, was not very clear. The trial Judge decided on the findings of the jury that judgment should be entered for the defendant, and the action should be dismissed.

That case came later on before the Supreme Court here, and then it was decided that the answer of the jury had not been

Appendix C.19

properly construed by the Courts below, and they gave judgment for the plaintiff.

In the formal judgment no mention is made of the interest. According to Art. 116 of the Judicature Act, it is stated that a verdict or judgment shall bear interest from the time of the rendering of the verdict or giving judgment.

The plaintiff contends that he should have interest from the date at which the jury made their findings of fact which had been submitted to them. Of course, if those findings of fact made by the jury constituted a verdict, then the plaintiff would be entitled to the interest from that date. But according to my opinion, the questions which were submitted to them were simply questions of fact, and the jury was not called upon to return a special or general verdict, and then the interest should be from the date of the judgment, *i.e.*, from the day at which the judgment has been rendered by the Supreme Court.

I do not see any reason why, in those circumstances, we should grant the alternative application made by the plaintiff for amending the judgment given by this Court or for giving leave to appeal.

The motion should be dismissed with costs.

APPENDIX C. 19.

Cromarty v. Cromarty, October 15, 1917.

The Chief Justice.—The motion to quash is based on three grounds: First, that the judgment appealed from was not final within the meaning of the Supreme Court Act. Second, the amount in controversy does not exceed $1,000, and thirdly, that the Supreme Court has no jurisdiction to hear or entertain an appeal in an alimony action.

The amendment to the Supreme Court Act (1913), gives the definition of "Final judgment" as follows:—

"(*e*) Save as regards appeals from the Province of Quebec, 'final judgment' means any judgment, rule, order or decision which determines in whole or in part any substantive right of any parties in controversy in any action, suit, cause, matter or other judicial proceeding; and as regards appeals from the Province of Quebec, 'final judgment' means, as heretofore, any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded."

In the present case the relief asked for in the declaration is that the plaintiff claims to be entitled to alimony from the defendant and also to interim alimony sufficient under the circumstances, and that defendant may be ordered to pay the same, and for these purposes that all necessary directions may be given and accounts taken. The costs of the action *de die in diem*, and such further order or relief as the nature of the case may require. Appendix C.19

The formal judgment at the trial declares, (1) that the plaintiff is entitled to a proper allowance per week by way of alimony so long as she shall continue to live separate and apart from the defendant, having regard to the means, station and position in life of the parties.

(2) That it be referred to the Master-in-Ordinary at Toronto, to ascertain and fix a proper allowance to be paid by the defendant to the plaintiff for alimony so long as she shall continue to live separate and apart from the defendant, having regard to the means, station and position in life of the parties.

(3) That the defendant pay to the plaintiff what the said Master may find proper to be allowed for her alimony up to the time of making of his report forthwith after the confirmation of the said report.

It seems to me clear that the judgment at the trial has determined the substantive right of the parties in the controversy, and that the objection taken to our jurisdiction on this ground must fail.

As to the third ground, from the argument of counsel I would gather his contention to be that independently altogether of section 48 of the Supreme Court Act (which limits appeals to this Court), the Supreme Court has no jurisdiction in alimony actions. I am not able to appreciate this contention. Under section 36, a general right of appeal is given from any final judgment of the highest Court of final resort in Ontario, where the Court of original jurisdiction is a Superior Court, and the present appeal falls within this section. The High Court of Justice for Ontario, by the Judicature Act, 1914, c. 51, s. 34, is given jurisdiction to grant alimony. This section comes from the Revised Statutes of 1877, and has its origin in chapter 2, 7 Wm. IV., which statute establishes a Court of Chancery in the Province of Upper Canada, and which by section 3 provides that the Court of Chancery "shall have the like power, authority and jurisdiction in all cases of claims for alimony that is exercised and possessed by any ecclesiastical or other Court in England."

Appendix C.19

The respondent's motion must really be based on section 48, which precludes an appeal from the Province of Ontario unless:—

(*a*) The title to real estate or some interest therein is in question.

(*b*) The validity of a patent is affected.

(*c*) The matter in controversy in the appeal exceeds the sum or value of one thousand dollars exclusive of costs.

(*d*) The matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights.

This section, so far as the present appeal is concerned, is substantially the same as section 46 of our Act, which limits appeals in the Province of Quebec, and this case, it seems to me, is not distinguishable in principle from *Odell* v. *Gregory*, 24 Can. S. C. R. 661, and *Talbot* v. *Guilmartin*, 30 Can. S. C. R. 482.

In the first of these cases the action was brought by the plaintiff for a "séparation de corps" from his wife. The Superior Court granted the separation. This was reversed by the Court of Queen's Bench on appeal, and the action dismissed. The plaintiff sought to appeal to the Supreme Court of Canada, and this Court held that the case did not fall within section 29 (now 46) of the Supreme Court Act, and that the matter in controversy was not in the nature of a pecuniary demand, although there was a claim by the defendant arising out of a marriage contract which might incidentally be affected.

In *Talbot* v. *Guilmartin* the case was still stronger. Here the Court says:—

"The action of the respondent is founded on allegation of cruel and unlawful treatment, the conclusion taken is in the usual form for separation from bed and board, which of course is the principal relief sought, the other heads, which include amongst several others, a condemnation to pay $10,000 money of the respondent alleged to have come to the hands of the appellant, all being dependent upon and subordinate and incidental to the principal head, the separation from bed and board. The appeal, therefore, if admitted, would necessarily involve a discussion as to the sufficiency of the evidence, and the grounds for the adjudication on the question of separation The judgment as to the incidental matters would follow as of course the decision of the Court upon the main question involved in the action, which this Court would therefore be compelled to deal with primarily, irrespective altogether of any matters in

dispute as to the pecuniary or other consequential rights between the parties." Appendix C.20

I do not see how the present case can be distinguished in principle from the above cases. "Alimony is the allowance which a wife is entitled to from her husband's estate, for her maintenance, on separation from him for certain causes." (Murray's New English Dictionary). It is also defined in Stroud's Legal Dictionary as "that allowance which a married woman sues for on separation from her husband."

There was no contestation on the part of the defendant that the plaintiff was entitled to alimony, if she could establish the fact that a legal marriage had been entered into between them. A form of marriage had taken place, but the defendant claims that the ceremony was invalid, and that no relationship of husband and wife ever existed between the plaintiff and himself. The amount to which the plaintiff should be entitled was purely incidental to the determination of the main issue, just as in *Talbot* v. *Guilmartin* there was incidentally $18,000 involved if the plaintiff was entitled to a decree of "séparation de corps."

I am therefore of the opinion that this Court has no jurisdiction to hear the appeal.

Idington and Anglin, JJ., *dubitante.*

APPENDIX C. 20.

Crystal Ice Co. v. Pierson, May 1st, 1917.

The Chief Justice.—The trial Judge says: "The first question that I must determine is whether or not the shares for which the plaintiffs applied were allotted to them before the commencement of the action. There is absolutely no evidence to shew when or how or by whom this allotment took place. It is more by the conduct of the parties than anything else that I am driven to the conclusion that the company accepted the plaintiff's application for these shares, and that they knew that it had so accepted them."

If the case had come before me in first instance I should certainly have had great hesitation in holding that there ever was an allotment of these shares. I am not, however, prepared to reverse the judgment of the trial Judge unanimously concurred in by the Appellate Division.

The defendants, other than the appellant, have objected to the jurisdiction of this Court to entertain the cross-appeal.

Appendix C.20 Though perhaps the appeal ought rather to have been brought as a substantive appeal than by notice under Rule 100, yet I think such notice might properly have been given under the circumstances of the case.

The defendants against whom relief is sought by the cross-appeal are the directors of the appellant company. They are before the Court and are, of course, interested in opposing the cross-appeal. Further the procedure is the same as that followed in the Appellate Division of the Supreme Court of Alberta. These defendants did not move this Court to quash the cross-appeal, but appeared and put in a factum.

I would dismiss both the appeal and cross-appeal with costs, in each case.

Davies, J.—I concur in the reasons for his judgment given by the learned trial Judge, and affirmed by the Supreme Court of Alberta in appeal, and I would dismiss this appeal with costs.

I also concur in quashing the cross-appeal in this case based upon a mere notice under Rule 100—such rule not being applicable to the parties in the assumed cross-appeal.

Costs of motion to quash should follow.

Idington, J.—I would dismiss this appeal with costs. And as the cross-appeal depends upon questions of fact in regard to which two Courts below concur in finding there were no facts entitling the cross-appellants to the relief sought therein, would dismiss that also.

Duff, J.—The appeal and cross-appeal should both be dismissed with costs. It was argued that the cross-appeal was incompetent. Such a conclusion would be incompatible with the decision of this Court in *McNichol* v. *Malcolm,* 39 S. C. R. at p. 265.

Anglin, J.—Sub-section 1 of section 108, and sub-section 1 of section 109, of the Companies Ordinance of the North-West Territories read as follows:—

"108 (1).—No allotment shall be made of any share capital of any company offered to the public for subscription unless the following conditions have been complied with, namely:—

"(*a*) The amount, if any, fixed by the Memorandum or Articles of Association and named in the prospectus as a minimum subscription upon which the directors may proceed to allotment; or

"(*b*) If no amount is fixed and named, then the whole amount of the share capital so offered for subscription has been subscribed, and the sum payable on application for the amount so fixed and named for the whole amount offered for subscription has been paid to and received by the company. Appendix C.21

"109 (1).—An allotment made by the company to an applicant in contravention of the foregoing provisions of this ordinance shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and shall be voidable notwithstanding that the company is in course of being wound up."

In the case of the defendant company no amount was fixed and named as the minimum subscription under clause (*a*) of section 108.

Nothing appears which would justify interference with the holding of the learned trial Judge, affirmed on appeal, that the company had not obtained the subscription of the 6,000 shares of capital stock of which it had authorized the issue when it attempted to allot shares to the respondents, and that they were therefore entitled to have the allotments declared void, and the moneys paid by them returned. Neither has waiver or acquiescence by the respondents been shewn. The main appeal fails, and should be dismissed with costs.

For reasons stated in *Coy* v. *Pommerenke*, 44 S. C. R. 543, at p. 576, in which my Lord the Chief Justice concurred. I am of the opinion that the respondents cannot assert an appeal against the individual defendants, who were not parties to and were in nowise concerned in the main appeal, by merely giving a notice under Rule 100. Mr. Justice Davies also shared my views in that case. I would, therefore, quash the so-called cross-appeal with costs of a motion to quash.

APPENDIX C. 21.

Arnold v. Dominion Trust Company, Oct. 23rd, 1917.

Reasons of Registrar on motion to affirm jurisdiction.

This is an action brought by Laura Blanche Arnold on her own behalf, and as next friend of her infant children, against the Dominion Trust Company and its liquidator as executor of her deceased husband's estate. The plaintiff claims that large sums of money came to the hand of the defendants under certain

Appendix C.21

policies of life insurance; that her husband's will contained a bequest of $75,000 of these moneys, and she demands payment of the same to her. The executor replies that he has the money in question, but the clause in the will upon which the plaintiff relies, is ineffective, and that she has no legal claim.

It so happens in this case that the defendant company was insolvent and in process of liquidation, but the liquidation proceedings are in no sense involved in the determination of the present action, which has only to do with the construction and effect of the will of the plaintiff's husband. It is true that owing to the liquidation and by virtue of section 22 of the Winding-Up Act this action could not be brought without leave of the Supreme Court of British Columbia, but leave was not given so far as the record here shews, as a step in the Winding-Up proceedings, and therefore the provisions of the Winding-Up Act, which limits appeals in winding-up proceedings under the Act, have no application, as far as the present action is concerned. It appears to me the provisions of section 22 of the Winding-Up Act have no higher effect than if they were to be found in the Judicature Act of the province. The parties seem to have had this in view throughout the present action.

At page 9 of the case the Court says: "As I understand it, this is a separate and distinct action, not having anything to do with the winding-up. There is no reason why I should not take it." Mr. Martin (counsel for the defendants) respondents: "No, my Lord."

Again if the Winding-Up Act applies, leave should have been obtained for the appeal to the Court of Appeal for British Columbia, under section 101 of the Winding-Up Act, and it is admitted this was not done.

I am of opinion that leave to bring the action having once been obtained from the Supreme Court of British Columbia, all further proceedings in the suit were governed by the Judicature Act, and the Rules of British Columbia, and the further appeal to this Court is governed by the Supreme Court Act. If I am wrong in this view, the respondent will not be prejudiced as notwithstanding my order the Supreme Court may quash the appeal for want of jurisdiction.

Subsequently the Supreme Court affirmed its jurisdiction, 56 S. C. R. 433.

INDEX